BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 07-3391
(AND CONSOLIDATED CASES)

ALLIANCE FOR COMMUNITY MEDIA, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF JURISDICTION

The order on review was released on March 5, 2007, and a summary of the order was published in the *Federal Register* on March 21, 2007. The FCC's subject matter jurisdiction in this case is based on 47 U.S.C. §§ 201(b), 303(r), and Title VI of the Communications Act, including 47 U.S.C. § 541(a)(1). The petitions for review were consolidated in this Court pursuant to 28 U.S.C. § 2112(a). This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether, consistent with Congress's intent to promote competition in the video services market, the Federal Communications Commission acted properly when it adopted rules interpreting and implementing 47 U.S.C. § 541(a)(1), which bars local authorities from unreasonably refusing to award competitive cable franchises.

STATEMENT OF THE CASE

Section 621(a)(1) of the Communications Act of 1934, 47 U.S.C. § 541(a)(1), prohibits local franchising authorities ("LFAs") from "unreasonably refus[ing] to award" competitive cable franchises. In this proceeding, the FCC adopted rules to implement that provision in light of substantial record evidence that the operation of the local franchising process was unreasonably impeding competitive entry into the cable television market. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 (2007) (JA) ("*Order*"). The Commission's rules are designed to promote competition in a market long dominated by incumbent cable operators and to provide consumers with more choices and lower prices. *Order* ¶¶ 50-52 (JA -).

Petitioners – consisting primarily of LFAs, their representative organizations, and the incumbent cable industry's trade association – ask the Court to restore franchising practices that, in the Commission's judgment, violated the statute and impeded the development of a competitive cable marketplace.

STATEMENT OF FACTS

A. The Statutory Scheme

Under the Communications Act, the FCC serves "as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (internal quotations omitted). The Commission exercised this "broad authority" to regulate cable television service even before Congress enacted legislation specifically directed to cable, and the Supreme Court unanimously upheld the Commission's assumption of jurisdiction. *Id.* at 168, 178; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 701-05 (1984). For instance, in the early 1970s, the Commission required cable operators to obtain federal certificates of compliance before they could commence operations and conditioned eligibility for such certificates on a cable operator obtaining a state or local franchise that complied with FCC-prescribed standards.[1] The Commission designed that early regulatory regime to reflect "deliberately structured dualism": Instead of selecting a regulatory structure that would provide exclusive "[f]ederal licensing of all cable television systems," the Commission chose as a matter of policy to provide "[f]ederal regulation of some aspects, with local regulation of others under federal prescription of standards for local jurisdictions."[2]

In 1984, Congress amended the Communications Act by adding Title VI, which was directed specifically to cable television services.[3] Any company seeking to offer "cable service"[4] as a "cable operator"[5] is subject to Title VI's cable franchising provisions. Section 621(b) of the Act, 47 U.S.C. § 541(b), prohibits cable operators from providing cable service in a given area without first obtaining

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[1] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 FCC 2d 143, ¶¶ 177-179 (1972), *aff'd, ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

[2] *Id.* ¶¶ 171, 177. The local franchising standards that the Commission adopted – which were "administered in the [federal] certificating process" – "relate[d] to such matters as the franchise selection process, construction deadlines, duration of the franchise, rates and rate changes, the handling of service complaints, and the reasonableness of franchise fees." *Id.* ¶ 177. The Commission ended the certificate requirement in the late 1970s for pragmatic reasons unrelated to its legal authority. *See Order* at n.286 (JA).

[3] Cable Communications Policy Act of 1984 ("1984 Cable Act"), Pub. L. No. 98-549, 98 Stat. 2779.

[4] *See* 47 U.S.C. § 522(6).

[5] *See* 47 U.S.C. § 522(5).

a cable franchise. And section 621(a), 47 U.S.C. § 541(a), circumscribes the power of LFAs to award or deny such franchises.

As originally enacted, section 621(a)(1) stated that an LFA "may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction." 1984 Cable Act, § 621(a)(1). In 1990, however, the FCC submitted a report to Congress urging that, in order to "encourage more robust competition in the local video marketplace, the Congress should ... forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service." *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 4974 (1990).

Responding to the Commission's recommendation, Congress in 1992 revised section 621(a)(1) to provide that "[a] franchising authority may award, in accordance with the provisions of this title, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and *may not unreasonably refuse to award an additional competitive franchise*." 47 U.S.C. § 541(a)(1) (emphasis added).[6] Congress found this change necessary because, "[f]or a variety of reasons, including local franchising

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[6] *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460.

requirements," most cable subscribers had "no opportunity to select between competing cable systems." H.R. Conf. Rep. No. 102-862, at 55 (1992). Congress hoped that its amendment to section 621(a) would ensure that subscribers received the "benefits from competition" between cable systems. S. Rep. No. 102-92, at 14 (1991).[7]

Congress sought to promote competition further when it enacted the Telecommunications Act of 1996 (the "1996 Act"),[8] which seeks to open markets in virtually every segment of the communications industry. Section 706(a) of the 1996 Act directs the Commission to encourage broadband deployment – which offers a platform for the provision of video services to consumers – through "measures that promote competition … or other regulating methods that remove barriers to infrastructure investment." 1996 Act, § 706(a).

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[7] The 1992 Cable Act also amended section 621(a)(1) to provide that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 635." 47 U.S.C. § 541(a)(1). Section 635, in turn, states that "[a]ny cable operator adversely affected by any final determination made by a franchising authority under section 621(a)(1) … may commence an action within 120 days after receiving notice of such determination" in federal court or a state court of general jurisdiction. 47 U.S.C. § 555(a).

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

B. The Local Franchising Rulemaking

(1) The Local Franchising *NPRM*

More than a decade after the 1992 amendments to section 621(a)(1) became law, little headway had been made in the development of meaningful cable competition. The U.S. General Accounting Office reported in late 2003 that cable subscribers in only "about 2 percent of markets hav[e] the opportunity to choose between two or more wire-based video operators."[9] This pervasive lack of wireline cable competition was having a profound effect on consumer welfare. Data compiled by the Commission showed that from 1995 through 2004, average prices for the types of cable service packages taken by the vast majority of consumers (basic-plus-expanded-basic) rose by over 90%. *Cable Prices Report* ¶¶ 2, 7, 10. In 2004, average price increases for such packages far outpaced inflation (5.2% to 3.0%). *Id.* ¶¶ 10, 18. In the relative handful of communities "where wireline competition is present," however, cable prices were "17 percent lower" than elsewhere. *Id.* ¶ 2. *See also Order* ¶ 50 & n.183 (JA) (cataloguing evidence of the impact of competition on cable rates). Consumers in the vast

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[9] U.S. General Accounting Office, GAO-04-08, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 9 (October 2003). Although satellite-based video services were available more broadly, the FCC has found that competition from direct broadcast satellite providers "does not appear to constrain cable prices." *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087, ¶ 2 (2006) ("*Cable Prices Report*").

majority of communities without wireline cable competition were being denied this competitive benefit – at a staggering aggregate cost totaling potentially billions of dollars per year.[10]

Evidence suggested that at least some portion of the immense annual cost of foregone competition was attributable to the operation of the cable franchising process – either directly as a result of the time that process takes, or indirectly because LFA demands deterred potential competitors from entering the market. These problems were magnified by the sheer number of local franchise approvals necessary to provide cable service.[11] It is therefore not surprising that in annual reviews of the state of video competition and in other administrative proceedings, the Commission saw indications that, "in many areas," the "operation of the local franchising process [was] serving as an unreasonable barrier to entry."[12]

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[10] *See* Phoenix Center Policy Bulletin No. 13, "'In Delay There Is No Plenty': The Consumer Welfare Cost of Franchise Reform Delay," at 1-4, 13 (January 2006) (JA   ) (estimating that, nationwide, the consumer welfare cost of one year's delay in introducing cable competition is $8.2 billion); Jerry Brito & Jerry Ellig, "Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives," 5 J. Telecomm. & High Tech. L. 199, 227-29 (2006) (JA   ) (estimating the annual cost of delaying nationwide cable competition to be $6.3 billion and listing results of other studies estimating annual costs ranging from $7.5 billion to $14 billion).

[11] Verizon, for example, will require 2500 to 3000 separate franchises in order to provide video services in its service area. *Order* ¶ 15 (JA   ).

[12] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 20 FCC Rcd 18581, ¶ 5 (2005) (JA   ) ("*NPRM*").

Consequently, the Commission initiated a rulemaking proceeding "to determine whether, in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the [Communications] Act or are hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment." *NPRM* ¶ 10 (JA). In the latter event, the Commission undertook broadly to determine "whether and how we can remedy the problem." *Ibid.*; *see also id.* ¶¶ 11-24 (JA -).

(2) The Order On Review

After reviewing a "voluminous record" – which included "comments filed by new entrants, incumbent cable operators, LFAs, consumer groups, and others" – the Commission concluded that federal rules were needed to prevent the operation of the local franchising process from acting as "an unreasonable barrier to entry for potential cable competitors." *Order* ¶ 18 (JA).

1. The Commission found express rulemaking authority in section 201(b) of the Communications Act, which empowers the agency to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." *Order* ¶ 54 (JA) (quoting 47 U.S.C. § 201(b)). That grant of authority, the Commission concluded, "necessarily includes Title VI of the Communications Act in general, and Section 621(a)(1) in particular." *Ibid.* The agency also determined that other statutory provisions reinforced that authority, including 47 U.S.C. § 303(r), which empowers the Commission to "[m]ake such rules and regulations ..., not inconsistent with law, as may be necessary to carry out the provisions of this Act." *See Order* ¶¶ 54-55, 62 (JA - ,) (citing 47 U.S.C. §§ 152, 154(i), 303(r), and 1996 Act, § 706). The Commission further noted that "Congress specifically charged [it] with the administration of the Cable Act," and that "federal courts have consistently upheld the Commission's authority in this area." *Order* ¶ 55 (JA).

The Commission also determined that the availability of judicial review of final LFA franchising decisions did not diminish its rulemaking authority. *Order* ¶ 56 (JA). It explained that "[t]he mere existence of a judicial review provision in the Communications Act does not, by itself, strip the Commission of its otherwise undeniable rulemaking authority." *Ibid.* (citing *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988)). "As a general matter," the Commission said, "the fact that Congress provides a mechanism for judicial review to remedy a violation of a statutory provision does not deprive an agency of the authority to issue rules interpreting that statutory provision." *Ibid.*

2. The Commission proceeded to adopt rules to address the most pressing problems in the franchising process.

First, recognizing that prolonged delays in the process may amount in practice to unreasonable refusals to award franchises, the Commission established time limits for LFAs to render decisions on competitive franchise applications. *Order* ¶¶ 22-24, 66-67 (JA - , -). Concluding that applicants (such as telephone companies) with existing authorizations for access to rights-of-way "should be subject to a shorter time frame for review than other applicants," the Commission established a 90-day time limit for LFAs to issue final decisions on applications from such applicants, and a time limit of six months for LFAs to rule on other competitive franchise applications. *Order* ¶¶ 70-72 (JA -).[13]

To make these deadlines meaningful, the FCC declared that if an LFA failed to make a decision in the requisite time, the applicant's proposal would be "deemed" granted on an interim basis until the LFA issued a final decision. *Order* ¶ 77 (JA). Because the Commission believed that the prescribed 90-day and six-month time limits would provide ample time for LFA action on franchise applications, it predicted that "deemed" grants would likely be rare. *Order* ¶ 81 (JA). It also noted that even if a "deemed grant" were to occur, LFAs and applicants would have strong incentives to continue negotiating a franchise agreement. *Ibid.*

[13] The Commission provided that the deadlines for final LFA action would be tolled when the LFA requests information from the applicant and is awaiting a response. *Order* ¶ 75 (JA). The agency also said that LFAs and applicants could agree to extend the otherwise applicable deadlines. *Order* ¶ 73 (JA).

The Commission also took steps to narrow and clarify the "list of legitimate issues to be negotiated" between applicants and LFAs. *Order* ¶ 71 (JA); *see also id.* at n.261 (JA). The record demonstrated a need for clarification in a number of areas. For instance, with respect to requirements that cable companies build out their networks – "one of the most contentious [issues] between LFAs and prospective new entrants" – the Commission found that such obligations "can greatly hinder the deployment of new video and broadband services" by increasing the cost of competitive entry. *Order* ¶ 31 (JA); *see generally id.* ¶¶ 31-42 (JA -).

Disagreements also were prevalent with respect to the proper application of the statutory cap on the amount of cable franchise fees that LFAs could collect. *See* 47 U.S.C. § 542(b). New entrants demonstrated that LFA payment demands (sometimes unrelated to cable service) and a general lack of clarity over the proper scope and calculation of such fees were impeding entry. *Order* ¶¶ 43-45 (JA -). The record also showed that Commission guidance was needed to clarify "what requirements LFAs reasonably may impose on franchisees to support" public, educational, and governmental ("PEG") channels and institutional networks ("I-Nets"), since some LFAs were demanding that franchise applicants provide excessive levels of PEG and I-Net support. *Order* ¶ 46 (JA -).

Addressing these concerns, the Commission ruled that an LFA would "unreasonably refuse to award" a competitive franchise in violation of section 621(a)(1) if it declined to grant such a franchise because of the applicant's unwillingness to accept: (1) certain entry-impeding build-out requirements;[14] (2) demands for payments or other contributions that would unlawfully circumvent the 5 percent statutory franchise fee cap;[15] (3) demands for unreasonable undertakings related to PEG support and I-Nets;[16] and (4) demands with respect to non-cable services and facilities.[17] The Commission also provided needed guidance on the line between reasonable and unreasonable LFA demands in these areas. *See Order* ¶¶ 89-93 (JA -) (build-out), 97-109 (JA -) (franchise fees), 113-120 (JA -) (PEG/I-Net), 121-124 (JA -) (non-cable/mixed-use facilities and services).

3. The Commission concluded that its rules and guidance implementing section 621(a)(1) would preempt inconsistent local laws, regulations, and requirements. *Order* ¶¶ 125-138 (JA -). At the same time, the Commission declined for the time being to preempt state laws, state-level franchising decisions, or local franchising decisions that are "specifically authorized by state law." *Order*

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[14] *Order* ¶¶ 82-93 (JA -).

[15] *Order* ¶¶ 94-109 (JA -).

[16] *Order* ¶¶ 110-120 (JA -).

[17] *Order* ¶¶ 121-124 (JA -).

¶ 126 (JA). It explained that it lacked "a sufficient record to evaluate whether and how such state laws may lead to unreasonable refusals to award additional competitive franchises." *Ibid.*

4. The Commission also acted incrementally in defining the types of cable providers subject to the franchising relief provided in the *Order*. Although some of the *Order*'s guidance was potentially germane to existing franchisees, the Commission emphasized that the immediate focus of the rulemaking was on implementing section 621(a)(1), which – by its terms – applies only to the treatment of applications for "*additional* competitive franchise[s]." *Order* ¶¶ 94, 139 (JA ,). The Commission therefore sought further comment on the appropriate treatment of existing franchisees. *Order* ¶ 140 (JA).

C. Subsequent Events

After filing petitions for judicial review of the *Order*, the Alliance for Community Media ("ACM") and other petitioners asked the Court to stay the *Order*'s effectiveness pending review. This Court denied that request on July 24, 2007.

SUMMARY OF ARGUMENT

For many years, incumbent cable operators dominated the market for cable television service. Consumers who wanted cable service typically had no choice but to purchase it from the lone cable company that served their franchise area.

Without any competition to discipline the cable industry, cable rates rose dramatically.

After receiving numerous complaints from dissatisfied cable subscribers, Congress moved to open the cable market to competition. Among other things, in 1992, it amended section 621(a)(1) of the Communications Act to prohibit cable franchising authorities from "unreasonably refus[ing] to award" additional franchises. 47 U.S.C. § 541(a)(1). Congress had hoped that the issuance of competitive cable franchises would produce lower rates and more choices for consumers.

More than a decade later, the promise of cable competition remained unrealized for most Americans. The FCC – the agency that Congress entrusted with implementing the Communications Act – was justifiably concerned about the sluggish development of cable competition. It initiated a proceeding to determine whether the operation of the franchising process was unreasonably impeding competitive entry.

On the basis of the record compiled in this proceeding, the Commission found that the operation of the franchising process was stunting the growth of competition in two ways. First, excessive delays in processing franchise applications had unnecessarily postponed – or even derailed – the onset of competition in many communities. Second, prospective competitors could not obtain franchises without acceding to LFAs' unreasonable demands regarding build-out, franchise fees, PEG support, and the regulation of non-cable services. In the Commission's considered judgment, these unwarranted delays and unreasonable demands had caused violations of the statutory ban on unreasonable refusals to award competitive franchises set forth in section 621(a)(1). To ensure more effective enforcement of that ban, and to help bring long-overdue cable competition to communities throughout the nation, the Commission reasonably adopted rules to implement section 621(a)(1).

Petitioners strongly disagree with the policy decisions underlying the FCC's *Order*. But the intensity of their policy disagreements cannot compensate for the weakness of their legal arguments. Although they present a multitude of claims, petitioners have not given the Court any good reason to disturb the *Order*.

I. Congress has given the FCC broad rulemaking authority to implement all of the provisions of the Communications Act, including section 621(a)(1). The Commission properly exercised that authority in this proceeding. Contrary to petitioners' assertion, the rules at issue here will not prevent LFAs from performing their duties. LFAs will still be able to take reasonable measures to ensure that new cable franchisees meet the needs of their communities. The rules merely preclude LFAs from engaging in the sort of unreasonable conduct that would violate section 621(a)(1). Nor will the courts be displaced; they will continue to adjudicate disputes between LFAs and franchise applicants.

II. The Commission's decision to regulate rested on a solid evidentiary foundation. The record contained substantial evidence that the operation of the franchising process was plagued by unduly long delays and unreasonable LFA demands. On the basis of that evidence, the Commission reasonably decided to adopt rules to address these problems.

III. Petitioners claim that the *Order* "rewrites" the statute. But the Commission here did nothing more than interpret the ambiguous phrase "unreasonably refuse to award" in section 621(a)(1) as well as other ambiguous provisions of Title VI. This sort of statutory construction is a task that Congress routinely entrusts to federal agencies. The rules adopted by the FCC flowed logically from its reasonable reading of the Act.

The Commission reasoned that excessive delays in processing new franchise applications constitute unreasonable refusals to award competitive franchises. The agency therefore imposed reasonable deadlines by which LFAs must render decisions on pending applications. The Commission also declared that if an LFA failed to issue a decision within the prescribed time limit, an interim franchise (based on the applicant's offer) would be "deemed granted." The Commission predicted that such interim franchises would rarely be triggered, but concluded that such a remedy was necessary to ensure LFAs' compliance with the time limit rules. The Commission emphasized, however, that even after a deemed grant of an interim franchise, an LFA may continue to negotiate with an applicant. Additionally, the LFA may ultimately deny the application after the deadline if it has a reasonable basis for doing so, thus terminating the interim franchise.

In addition, the Commission properly determined that LFAs' unreasonable demands of potential new entrants were resulting in unreasonable refusals to award franchises. To guard against such violations of section 621(a)(1), the agency adopted rules addressing some of the most contentious subjects of franchise negotiations: build-out, franchise fees, PEG support, and regulation of non-cable services. For each of these topics, the Commission provided guidance as to what kinds of demands would be unreasonable. This guidance will help simplify future franchise negotiations, thereby facilitating the entry of cable competitors into the video services market.

IV. Petitioners' remaining challenges to the *Order* are baseless. The Commission's actions were constitutional. The agency provided adequate notice of its rules. And it reasonably decided to address the issues in this proceeding incrementally.

STANDARD OF REVIEW

Petitioners' challenge to the FCC's interpretation of the Communications Act is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005) ("*Brand X*").[18] In particular, the Court "must give great deference to the views of a federal agency with regard to the scope of its authority." *Cleveland National Air Show, Inc. v. United States Department of Transportation,* 430 F.3d 757, 763 (6th Cir. 2005) (internal quotations omitted). *See also Commodity Futures Trading Commission v. Schor,* 478 U.S. 833, 844-45 (1986).

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[18] *See also GTE Midwest, Inc. v. FCC,* 233 F.3d 341, 347-48 (6th Cir. 2000) (deferring to the FCC's reasonable interpretation of an ambiguous provision of the Communications Act).

Petitioners also challenge the reasonableness of the FCC's *Order*. Under the Administrative Procedure Act ("APA"), the *Order* may be "set aside … only if it is arbitrary, capricious, abusive of discretion or otherwise not in accordance with law." *Cellnet Communications, Inc. v. FCC,* 149 F.3d 429, 436 (6th Cir. 1998); *see also* 5 U.S.C. § 706(2)(A). When reviewing agency action under this standard, a court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *see also Northeast Ohio Regional Sewer District v. EPA,* 411 F.3d 726, 732 (6th Cir. 2005), *cert. denied,* 126 S. Ct. 2966 (2006). "[T]he arbitrary and capricious standard is deferential toward agency decisions." *Goldin v. FDIC,* 985 F.2d 261, 263 (6th Cir. 1993). To satisfy this standard, an agency need only "articulate a rational connection between the facts found and the choice made" and "provide something in the way of documentary support for its action." *GTE Midwest,* 233 F.3d at 345 (internal quotations omitted).

ARGUMENT

I. THE COMMISSION HAD AUTHORITY TO ISSUE RULES IMPLEMENTING SECTION 621.

Petitioners maintain that the Commission lacked the authority to promulgate rules interpreting and implementing Section 621 or to preempt conflicting local laws. ACM Br. 15-28; Tampa Br. 13-15, 24-27; NCTA Br. 22-34; Fairfax Br. 38-

50; New Jersey Br. 9-15. Those arguments rest on a fundamental misunderstanding of the statutory scheme.

A. The Communications Act Authorizes The Commission To Adopt Rules Implementing Section 621(a)(1).

Petitioners should be well aware that the Commission has the authority to interpret section 621. In *City of Chicago v. FCC,* 199 F.3d 424, 428 (7th Cir. 1999), *cert. denied,* 531 U.S. 825 (2000), some of the same petitioners urged the Seventh Circuit to find that "the FCC was not granted regulatory authority over" section 621. That court concluded, however, that "the FCC has well-accepted authority" to administer Title VI of the Communications Act; and it squarely rejected the argument that the agency "lacks authority to interpret [section 621]." *Ibid. See also National Cable Television Association v. FCC,* 33 F.3d 66, 70-75 (D.C. Cir. 1994) ("*NCTA*") (upholding a Commission ruling that certain types of video service providers are not subject to the cable franchise requirements of section 621).[19]

[19] *City of Chicago* and *NCTA* make clear that the Commission need not rely on its "ancillary" authority to implement section 621. Indeed, the courts have repeatedly recognized that the FCC has authority to interpret and implement the provisions of Title VI. *See, e.g., City of New York v. FCC,* 486 U.S. 57, 70 n.6 (1988); *United Video, Inc. v. FCC,* 890 F.2d 1173, 1182-83 (D.C. Cir. 1989); *ACLU,* 823 F.2d at 1579-80. Consequently, ACM's challenge to the agency's ancillary jurisdiction (Br. 26-28) is irrelevant.

The Communications Act confers broad rulemaking authority on the FCC. In particular, section 201(b) of the Act empowers the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). The Supreme Court has stressed that section 201(b) "means what it says: The FCC has rulemaking authority to carry out" the provisions of the Communications Act. *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 378 (1999). Section 201(b) authorizes the FCC "to make rules governing matters to which the [Communications] Act applies." *Id.* at 380. Contrary to petitioners' claim (ACM Br. 26; NCTA Br. 23), section 201(b) is not confined to regulation of common carriers under Title II of the Act. By its terms, section 201(b)'s grant of authority extends to the entire "Act," which necessarily includes section 621(a)(1). *See Illinois Bell Telephone Co. v. Village of Itasca*, 2007 WL 1560263, at *14 (N.D. Ill. May 25, 2007) (section 201(b) gives the Commission authority to interpret section 621(a)(1)).

Besides section 201(b), section 303(r) of the Act authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. § 303(r). This "broad rulemaking power" also extends to Title VI of the Act. *City of New York,* 486 U.S. at 70 n.6; *see also United Video*, 890 F.2d at 1183.[20]

Petitioners argue that the Act contains no specific directive for the agency to adopt rules regarding section 621(a)(1). ACM Br. 19, 22-23; NCTA Br. 24-27; Fairfax Br. 40. But that does not mean the Commission lacks authority to do so. There is an "obvious difference between a statutory *requirement* … and a statutory *authorization*." *Alaska Department of Environmental Conservation v. EPA,* 540 U.S. 461, 491 (2004) ("*ADEC*"). As the Supreme Court has observed, it is "not peculiar that [congressionally] *mandated* regulations should be specifically referenced" in the Communications Act, "whereas regulations *permitted* pursuant to the Commission's § 201(b) authority are not." *AT&T,* 525 U.S. at 385 (emphasis added).

[20] Insofar as petitioners challenge the Commission's reliance on section 706 of the 1996 Act (ACM Br. 27; NCTA Br. 27-29; Tampa Br. 28-29), they misconstrue the *Order*. Contrary to petitioners' assumption, the Commission did *not* regard section 706 as an independent source of rulemaking authority. Rather, the agency said that its authority to adopt rules implementing section 621(a)(1) was "further supported by" section 706, and that it could "consider the goals of section 706" – specifically, the promotion of widespread broadband deployment – "when formulating regulations under the Act." *Order* ¶ 62 (JA) (citing *United States Telecom Association v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004)).

B. The Commission's *Order* Does Not Improperly Infringe On The Authority Of LFAs Or Courts.

Contrary to petitioners' claims (ACM Br. 19-21; Tampa Br. 13-15, 24-27; Fairfax Br. 42-44; NCTA Br. 31; New Jersey Br. 9-15), the FCC's exercise of rulemaking power in this case was fully consistent with the administrative structure established by Title VI. The Commission did nothing here to usurp the proper role of either LFAs or reviewing courts.

(1) The *Order* Does Not Displace LFAs.

Congress authorized state and local officials to award cable franchises, subject to the limitations established by federal law. However, that in no way detracts from the Commission's authority to implement the statutory provisions that govern the franchising process. In an analogous situation, the Supreme Court held in *AT&T,* 525 U.S. at 385, that 47 U.S.C. § 252, which authorizes state commissions to arbitrate disputes over network sharing arrangements between phone companies, did not "logically preclude the Commission's issuance of rules to guide the state-commission judgments." Similarly, the role of state and local officials in the cable franchising process does not preclude the FCC from establishing rules to guide LFAs' judgments under Title VI.

Furthermore, although Title VI gives LFAs discretion to negotiate franchises that are tailored to meet the specific needs of their local communities (ACM Br. 15-17; NCTA Br. 31-32; Fairfax Br. 39-40; Tampa Br. 13-14), that discretion is not boundless. As NCTA acknowledges (Br. 33), LFAs' freedom "to negotiate the franchise terms that best reflect their community needs" is constrained by "the limits established explicitly in the Communications Act." Section 621(a)(1) establishes one such limit: A franchising authority "may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). In the *Order*, the Commission did nothing more than reasonably interpret this statutory restriction on LFAs' power, consistent with Congress's objective to enhance competition and consumer choice in the video services market.

Moreover, "assur[ing] that cable systems are responsive to the needs and interests of the local community," 47 U.S.C. § 521(2), is just one of a number of competing purposes behind the cable provisions of the Communications Act. Congress also adopted Title VI of the Act to "establish a national policy concerning cable communications," 47 U.S.C. § 521(1); to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," 47 U.S.C. § 521(3); to make available "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4); and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems," 47

U.S.C. § 521(6). The FCC is entitled to substantial deference when it seeks to strike a balance among these competing objectives.[21]

Tampa asserts (Br. 17) that the FCC has left "nothing" for LFAs to do because the *Order* "defines what a franchise must contain." The *Order* does no such thing. It does not prescribe *any* particular elements that a franchise *must* include. Rather, the *Order* identifies certain terms that an LFA cannot reasonably demand from a competitive franchise applicant as a condition of awarding a franchise. As long as LFAs avoid the unreasonable practices described in the *Order*, they retain broad discretion to negotiate franchises that meet the unique needs of their communities.

The Supreme Court upheld a similar federal regulatory scheme in the 2004 *ADEC* case. Under that scheme, which was created by the Clean Air Act, state authorities are primarily responsible for deciding whether a proposed facility is equipped with the "best available control technology" ("BACT") for reducing air pollution emissions. *See* 42 U.S.C. § 7479(3). The Supreme Court recognized that state regulators would be "best positioned to adjust for local differences ... that might make a [pollution control] technology 'unavailable' in a particular area."

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[21] *See National Association of State Utility Consumer Advocates v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004) ("The Commission is necessarily entitled to substantial deference when it must ... balance two congressional policies that cannot both be fully achieved.").

ADEC, 540 U.S. at 488. Nonetheless, the Court held that the EPA had the authority to block a facility's construction if it found that a state's BACT determination was unreasonable. Dismissing concerns that the EPA was supplanting the states, the Court noted: "EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations." *Id.* at 489. Because the EPA's role was limited to preventing unreasonable BACT designations, the Court concluded that states would continue to have "considerable leeway" to make BACT determinations that take account of local conditions. *Id.* at 490.

Like the EPA in *ADEC,* 540 U.S. at 491, the FCC in this case is playing a "limited but vital role" in enforcing federal law. The Commission has not replaced LFAs as the primary decisionmakers in the cable franchising process. Rather, the FCC's new rules merely prevent LFAs from unreasonably refusing to award additional franchises in violation of section 621(a)(1). Those rules, which restrict *unreasonable* conduct, do not affect LFAs' broad discretion to craft *reasonable* franchise agreements that satisfy the specific needs of their localities.

(2) The *Order* Does Not Displace The Courts.

Petitioners argue that the Commission, by interpreting section 621(a)(1), has assumed a role that Congress reserved for the courts. They maintain that because the Act creates a judicial remedy for unreasonable denials of competitive franchise applications, Congress intended to foreclose the FCC from adopting rules interpreting and implementing section 621(a)(1). ACM Br. 17-21; NCTA Br. 24-26; Tampa Br. 16-17; New Jersey Br. 10-11. This claim is baseless.

Absent a clearly expressed intent to strip the FCC of its rulemaking power, the fact that Congress provides for a judicial review process to remedy a violation of a statutory provision does not diminish the agency's authority to issue rules interpreting and implementing that provision. *Order* ¶ 56 (JA). For example, although the Communications Act specifically provides for judicial review of state commission decisions arbitrating interconnection disputes between telephone companies, *see* 47 U.S.C. § 252(e)(6), the Supreme Court upheld the FCC's authority to issue rules governing the states' resolution of such disputes. *AT&T,* 525 U.S. at 377-85. As the Court explained, Congress's "assignment[]" of the adjudicatory task to state commissions did not "logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments." *Id.* at 385. Similarly, notwithstanding a reference to "court action" in 47 U.S.C. § 542(d), the D.C. Circuit held that the Commission and the courts have concurrent jurisdiction over franchise fee disputes that arise under that section. *ACLU,* 823 F.2d at 1573-75. And in an analogous context, the Supreme Court rejected an argument that statutes providing for judicial resolution of customs disputes precluded judicial deference to the Treasury Department's customs regulations: "Though Congress might have chosen to direct the court not to pay deference to the agency's views, we do not find that directive in these statutes." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

There is no basis for petitioners' assertion that the *Order* renders the statute's judicial review provisions meaningless. ACM Br. 19-20; Tampa Br. 17. The Commission will not hear appeals involving LFAs' denials of competitive franchises; the courts will continue to play that exclusive role. Petitioners complain that courts will be bound to apply the FCC's rules when adjudicating such appeals. But the applicability of agency regulations to a court proceeding does not diminish the significance of judicial review: "Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, *de novo*." *Haggar Apparel*, 526 U.S. at 391.

C. The Commission Was Authorized To Preempt Local Laws That Conflict With Its Rules Interpreting Section 621(a)(1).

Section 636(c) of the Act states that (with exceptions not pertinent here) "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c). This statutory preemption applies to laws that conflict with section 621(a)(1). In particular, section 636(c) mandates the preemption of "any local law that causes an unreasonable refusal to award a competitive franchise in violation of" section 621(a)(1). *Order* ¶ 127 (JA).

In the *Order*, the FCC adopted rules to enforce the statutory ban on unreasonable refusals to award additional cable franchises. Because those rules reasonably define various scenarios that would violate this statutory prohibition, the FCC found that a violation of the rules would amount to a violation of the statute itself. Accordingly, to give full effect to the preemption prescribed by section 636(c), the Commission properly determined that local laws that conflict with its rules interpreting section 621(a)(1) are preempted by federal law. *Order* ¶¶ 125-138 (JA -).[22]

Petitioners contend that the Commission cannot preempt local cable franchising laws unless Congress has expressly authorized such preemption. New Jersey Br. 13-15; ACM Br. 13; Tampa Br. 24. Even assuming that this is true, "Congress could not have stated its intent to limit local franchising authority more clearly." *Order* ¶ 131 (JA). Section 636(c) requires preemption of any local laws that are inconsistent with the Act; and section 621(a)(1) prohibits

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[22] Tampa mistakenly asserts (Br. 55) that the *Order* preempted *every* local "level-playing-field" requirement, "regardless of its content, and regardless of the circumstances it addresses." The *Order* did no such thing. It preempted local "level-playing-field" mandates only "to the extent" they are "inconsistent with the rules, guidance, and findings adopted" in this proceeding. *Order* ¶ 138 (JA).

unreasonable refusals to award additional cable franchises. These provisions leave no doubt that Congress intended to preempt local laws that cause unreasonable refusals to award competitive franchises.

New Jersey suggests (Br. 13-15) that unless the Act expressly preempts specific types of local laws, the Commission cannot adopt preemptive rules. That is incorrect. It is well settled that "[f]ederal regulations have no less pre-emptive effect than federal statutes." *Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 153 (1982). "The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York,* 486 U.S. at 64; *see also First Tennessee Bank National Association v. Barreto*, 268 F.3d 319, 330-31 (6th Cir. 2001).

When an agency's decision to preempt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," the Court should not disturb the preemption "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Capital Cities Cable,* 467 U.S. at 699 (internal quotations omitted). As we discussed in Part I.A above, Congress gave the Commission broad authority to construe the ambiguous provisions of Title VI, including section 621(a)(1). And as we explain in Part III below, the

Commission's rules reflect a reasonable interpretation of the ambiguous statutory phrase "unreasonably refuse to award." Because those rules reasonably define conduct that violates section 621(a)(1), they have the same preemptive effect that the Act itself does.

II. THE ADMINISTRATIVE RECORD SUPPORTED THE COMMISSION'S DECISION TO ADOPT RULES IMPLEMENTING SECTION 621(a)(1).

Although Congress amended section 621(a)(1) in 1992 to encourage LFAs to award additional franchises for their communities, *see* S. Rep. No. 102-92, at 14, fifteen years later, the Commission found "only a few hundred examples of competitive franchises": "In the vast majority of communities, cable competition simply [did] not exist." *Order* ¶ 19 (JA). The Commission also found that the dearth of competition costs consumers billions of dollars each year in higher cable rates. *Order* ¶ 50 & n.183 (JA). These findings are undisputed.

Petitioners nonetheless argue that the record did not support the Commission's decision to adopt rules implementing section 621(a)(1). Fairfax Br. 20-34; Tampa Br. 29-39; NCTA Br. 41-52; ACM Br. 34-37; New Jersey Br. 23. As an initial matter, a number of the challenged rules involve issues of statutory construction, the resolution of which does not require evidentiary support (*e.g.*, the Commission's interpretation of the cap on franchise fees). But even in those instances where evidentiary support was required, the record fully justified the Commission's actions.

In assessing whether the administrative record supports an agency's findings, the court's review under the applicable arbitrary and capricious standard converges with "substantial evidence" review.[23] The Court must give the agency's findings the "benefit of the doubt." *Wilson Air Center, LLC v. FAA*, 372 F.3d 807, 813 (6th Cir. 2004) (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 377 (1998)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sasse v. United States Department of Labor*, 409 F.3d 773, 778 (6th Cir. 2005) (internal quotations omitted). The Commission's findings must be upheld if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ibid.* (internal quotations omitted). The Commission's conclusions in this case easily meet that "highly deferential" standard. *Ibid.* (internal quotations omitted).

Ample record evidence supported the Commission's finding that the operation of the franchising process has impeded competitive entry in multiple ways. On the issue of undue delay, for instance, Verizon showed that, of its 113

[23] *See Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 681-86 (D.C. Cir. 1984).

franchise negotiations that were pending in March 2005 (outside of Texas, which had adopted statewide, streamlined franchising procedures), only 10 – or less than 10 percent – had resulted in franchise grants after one year. *Order* ¶ 22 (JA) (citing Verizon Reply Comments at 35 (JA) (noting that "well over 90 percent of [its] negotiations pending a year ago are not complete")). Other carriers related similar experiences.[24] Even LFAs acknowledged that the franchising process can be drawn out. *See* Chicago Comments at 4 (JA) (asserting that "new franchise agreement negotiations," from the time the "formal application" is received until the franchise is approved, "may require a year to conduct"); Indianapolis Comments at 8 (JA) (describing franchising as "a three-year process" and recommending that the Commission act to shorten it to "six to nine months").[25]

Similarly, the record contained substantial evidence that LFAs' build-out requirements can pose "the most significant obstacle to [new entrants'] plans to

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[24] *See Order* ¶ 22 (JA) (citing BellSouth Comments at 11 (JA) ("it took BellSouth nearly one year, on average, to obtain a local cable franchise, and in one case, the franchise negotiation process took almost three years to conclude"); *see also* NTCA Comments at 4 (JA) ("Another common complaint [among NTCA members] is that applications for franchising authority languish, unreasonably delaying the franchise process and the ability of competitors to offer service").

[25] While petitioners primarily blame applicants for these delays, the Commission reasonably rejected that argument as "inconsistent with both the record [and] common sense." *Order* ¶ 27 (JA).

deploy competitive video and broadband services." *Order* ¶ 31 (JA).[26] The record also showed that LFAs were raising prospective entrants' costs through a host of unreasonable demands.[27]

Tampa (Br. 31, 34, 44-45) challenges the Commission's reliance in a few instances on disputed or unverified evidence regarding LFA demands. As the D.C. Circuit has observed, however, "[a] degree of agency reliance on … comments is not only permissible but often unavoidable" because an agency could not function if it had to independently verify every assertion put forth in a comprehensive rulemaking proceeding. *NARUC v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Accordingly, under the deferential standard applicable to judicial review of agency findings, even "uncorroborated and untested testimony" can constitute "substantial evidence" in support of the

[26] *See* DOJ May 10 *Ex Parte* at 12 (JA); Qwest Comments at 9 (JA) (Qwest withdrew its franchise applications in eight local communities because of build-out requirements that "would have made the franchise economically irrational"); US Telecom July 28 *Ex Parte* at 11 (JA) (one small telephone company "was given the indication that its continued pursuit of a franchise would be in vain unless it agreed to build a new network throughout the rest of the town …. This additional build-out was not economically feasible, so [the company] withdrew its application and also ceased video service to all of its customers in other communities.").

[27] *Order* ¶ 43 (JA) (demands unrelated to cable service); *id.* ¶¶ 44-45 (JA -) (demands involving excessive franchise fees); *id.* ¶ 46 (JA) (demands involving excessive PEG/I-Net requirements).

agency's decision. *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002).[28]

Additionally, it is understandable why new entrants were somewhat reluctant "to identify specific instances of unreasonable requests": They were often "still trying to negotiate franchise agreements with the communities at issue" and reasonably feared that identifying those communities that had behaved unreasonably would sour the relationship. *Order* at n.352 (JA).

In any event, even if petitioners had established that, in isolated instances, the Commission had relied on information that later proved to be inaccurate, the error would be harmless in this case, in light of the substantial evidence supporting

[28] There is no basis for Tampa's claim (Br. 31 & n.19, 34) that the FCC improperly relied on "erroneous allegations" in a *Wall Street Journal* article concerning Tampa's dealings with Verizon. In one limited respect, that article – and Verizon's initial comments discussing its experience in Tampa – may have inaccurately characterized the conditions that Tampa had sought to place on Verizon's entry into that market. *See* Verizon Comments at 65 (JA). But once Tampa made Verizon aware of the issue, Verizon quickly filed revised comments (*see* Verizon Revised Comments at 65 (JA)), and the Commission fully acknowledged the clarification. *See Order* at n.149 (JA).

the Commission's findings in the record as a whole. *See* 5 U.S.C. § 706 (reviewing courts shall take "due account" of "the rule of prejudicial error").[29]

III. THE RULES THAT THE FCC ADOPTED IN THIS CASE ARE LAWFUL AND REASONABLE.

For purposes of implementing section 621(a)(1), the Commission sensibly construed the ambiguous phrase "unreasonably refuse to award" to encompass not only final decisions denying franchise applications, but also "situations where an LFA has unreasonably refused to award an additional franchise by withholding a final decision or by insisting on unreasonable terms that an applicant refuses to

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[29] NCTA contends (Br. 45) that "the Commission made a conscious effort, *after the fact*, to skew the record to support the conclusion it wanted to reach." (Emphasis added.) That argument makes no sense. The law is clear that judicial "review is to be based on the full administrative record that was before the [agency] *at the time* [it] made [its] decision." *Citizens to Preserve Overton Park*, 401 U.S. at 420 (emphasis added). The Verizon letter NCTA cites was not even cited in the *Order*, so there would have been no benefit to the Commission in "skew[ing]" the record to include it. Moreover, the untimely Tampa letter NCTA cites has since been made part of the record, *see Notice of Presentations in the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 2007 WL 2078682, at n.1 (Jul. 20, 2007), rendering moot NCTA's complaint about its initial rejection. NCTA also complains (Br. 46-48) about the Commission's solicitation of the Phoenix Center's response to staff views on one of its studies. This dialogue was a normal incident of the peer review process required by the Office of Management and Budget. *See* Letter of Monica Desai, Chief, Media Bureau, to Lawrence J. Spiwak, President, Phoenix Center (Feb. 22, 2007), *available at* http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518911529. Moreover, NCTA tellingly cites no part of the *Order* that is undermined by the peer review or the Phoenix Center's response to it, and there is none.

accept." *Order* ¶ 59 (JA). On the basis of that interpretation, the agency adopted rules designed to eliminate unwarranted delays in the franchising process and to deter unreasonable demands by LFAs.

Petitioners assert that section 621(a)(1) is not ambiguous. Fairfax Br. 42; Tampa Br. 26; ACM Br. 30; NCTA Br. 30. But they cannot seriously claim that the phrase "unreasonably refuse to award" has a single indisputable meaning. That phrase "is far from self-explanatory." *Order* ¶ 58 (JA). Words such as "reasonable" and "unreasonable" are inherently ambiguous, and courts have consistently deferred to agencies' interpretations of statutes that use those terms.[30] Likewise, this Court should uphold the FCC's rules construing the scope of the statutory ban on unreasonable refusals to award competitive cable franchises.

NCTA argues (Br. 29) that even if the FCC has authority to implement section 621(a)(1), its "authority extends only to determining" on a case-by-case basis "whether a particular franchise denial was or was not unreasonable," and not to adopting rules identifying categories of demands that would generally be

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[30] *See, e.g., Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) ("the generality" of the term "unreasonable" "opens a rather large area for the free play of agency discretion") (internal quotations omitted), *cert. denied*, 542 U.S. 937 (2004); *Capital Network System, Inc. v. FCC,* 28 F.3d 201, 204-06 (D.C. Cir. 1994) (deferring to the FCC's reading of the ambiguous term "unreasonable" in the Communications Act); *see also Beck v. City of Cleveland,* 390 F.3d 912, 925 (6th Cir. 2004) (citing with approval a district court's decision to defer to the Secretary of Labor's reading of the ambiguous phrase "reasonable period" in the Fair Labor Standards Act), *cert. denied,* 545 U.S. 1128 (2005).

unreasonable for LFAs to make. Only a perverse construction of the Act, however, would accept the FCC's authority to adjudicate disputes arising under the statute but bar the agency from interpreting it in order to prevent such disputes in the first place. That construction would also run counter to the rudimentary principle that "the choice made between proceeding by general rule or by individual, ad hoc litigation … lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947). And it would negate the FCC's long-established authority to make rules declaring practices generally reasonable or unreasonable under the Communications Act. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.,* 127 S. Ct. 1513, 1519 (2007).

Petitioners mount various challenges to the specific rules that the FCC adopted to address the "problems with the current operation of the franchising process." *Order* ¶ 65 (JA). None of their claims has merit.

A. The Commission's Rules Imposing Time Limits On The Franchising Process Are Lawful And Reasonable.

The FCC reasonably found that an LFA would violate section 621(a)(1) if it "unreasonably refused to award an additional franchise by withholding a final decision." *Order* ¶ 59 (JA). This sort of statutory violation was hardly a hypothetical concern. The record here showed that "unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services." *Order* ¶ 22 (JA). Some prospective entrants have "walked away from unduly prolonged negotiations" and abandoned their efforts to compete in the cable market. *Order* ¶ 24 (JA). "Others have filed lawsuits seeking a court order compelling the LFA to act, which entails additional delay, legal uncertainty, and great expense." *Ibid.* Many applicants, frustrated by protracted franchise negotiations, have even "accepted franchise terms they considered unreasonable in order to avoid further delay." *Ibid.*

The Commission was justifiably "concerned that without a defined time limit," the process of franchising competitive cable systems could "drag on for years" in some localities. *Order* ¶ 68 (JA). Left unchecked, such excessive delays "result in unreasonable refusals to award competitive franchises," depriving consumers of competitive video services and hampering broadband deployment. *Order* ¶ 67 (JA).[31] To address this problem, the Commission decided "to establish reasonable time limits for LFAs to render a decision on a competitive applicant's franchise application." *Ibid.*

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[31] Petitioners appear to concede that failing to issue a decision on an application may constitute a refusal to award a competitive franchise for purposes of section 621(a)(1). *See* ACM Br. 23-25.

Parties to this proceeding proposed "a wide range of time frames that may be reasonable for an LFA's consideration of a competitive franchise application" – time frames as brief as 17 days and as long as six months. *Order* ¶ 68 (JA); *see also id.* at n.253 (JA). After carefully considering these proposals, the Commission reasonably decided to impose two time limits on LFAs: (1) a deadline of 90 days to rule on applications from entities that already have access to rights-of-way; and (2) a deadline of six months to rule on all other competitive franchise applications. *Order* ¶¶ 70-73 (JA -).

(1) The Commission Had Authority To Establish Time Limits On The Processing Of Competitive Franchise Applications.

ACM contends (Br. 29-30) that the FCC had "no right" to impose any time constraints on LFA review of competitive franchise applications. "If Congress wanted a timing requirement under Section 621(a)(1)," ACM argues, "it would have imposed one just as it did with respect to renewals, modifications and transfers." ACM Br. 29 (citing 47 U.S.C. §§ 537, 545, 546).

This "argument overlooks the obvious difference between a statutory *requirement* ... and a statutory *authorization*." *ADEC*, 540 U.S. at 491.[32] Although Congress did not mandate a specific timetable for action on competitive franchise applications, it gave the FCC broad authority under sections 201(b) and 303(r) to adopt any rules necessary to implement section 621(a)(1). The Commission reasonably exercised that authority here. Having found that undue delay in acting on an application amounts to an unreasonable refusal to award a franchise, the Commission sensibly decided to set reasonable deadlines for LFAs to act on competitive franchise applications.

(2) The Time Limits Established By The Commission Are Reasonable.

Petitioners attack the particular time limits that the Commission adopted (90 days for reviewing applications from current users of rights-of-way, six months for reviewing all other applications). ACM maintains (Br. 37-46) that the 90-day time limit is unreasonable, while Tampa asserts (Br. 39-41) that both time limits are

[32] *See also Cheney Railroad Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir.) ("the contrast between Congress's mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion"), *cert. denied*, 498 U.S. 985 (1990); *General Motors Corp. v. NHTSA*, 898 F.2d 165, 170-71 (D.C. Cir. 1990) (when a statute includes an "express deadline" for one category of decisions but not another, the absence of a statutory deadline for the latter category could reasonably be construed to mean that "Congress left the choice to [the agency] whether or not to impose a deadline in the interests of smooth operation of the [statute]").

arbitrary. Essentially, petitioners object to the lines that the agency drew when selecting specific time limits. As this Court has observed, however, administrative lines "need not be drawn with mathematical precision." *Kirk v. Secretary of Health & Human Services,* 667 F.2d 524, 532 (6th Cir. 1981), *cert. denied,* 461 U.S. 957 (1983). Courts are "generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *Covad Communications Co. v. FCC,* 450 F.3d 528, 541 (D.C. Cir. 2006) (internal quotations omitted). In this case, petitioners have not come close to meeting this standard.

The Commission found that six months would give LFAs "a reasonable amount of time to negotiate with an entity that is not already authorized to occupy" rights-of-way. *Order* ¶ 72 (JA). The record contained "substantial evidence that six months provides LFAs sufficient time to review an applicant's proposal, negotiate acceptable terms, and award or deny a competitive franchise." *Ibid.* Indeed, NATOA (one of the petitioners here) told the Commission in February 2006 that "the six-month time limit that California law imposes is reasonable." *Order* ¶ 68 (JA). The Commission thus had good reason to believe that a six-month period would "provide LFAs ample time to conduct negotiations with an entity new to the franchise area." *Order* ¶ 72 (JA).

As for companies that already have access to rights-of-way, the FCC reasoned that their cable franchise applications should take less time to review because "an LFA need not devote substantial attention to issues of rights-of-way management." *Order* ¶ 70 (JA). In particular, the Commission noted that incumbent local phone companies have already demonstrated their "legal, technical, and financial fitness" to use rights-of-way to provide telephone service: "Thus, an LFA need not spend a significant amount of time considering the fitness of such applicants to access public rights-of-way." *Ibid.* (JA).[33]

In the Commission's reasoned judgment, this 90-day time limit – "a considerably longer time frame" than some parties had proposed – struck "the appropriate balance between the goals of facilitating competitive entry into the video marketplace and ensuring that franchising authorities have sufficient time to fulfill their responsibilities." *Order* ¶ 71 (JA). The record showed that franchising authorities are capable of completing their review of franchise applications within 90 days. In particular, numerous state statutes require decisions on cable franchise applications in less than 90 days. *Order* ¶ 16 (JA).[34]

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[33] Petitioner NATOA has acknowledged that when an incumbent local phone company applies for a cable franchise, "inquiry into the applicant's financial, technical and legal qualifications can usually be dispensed with." NATOA Comments at 38 (JA).

[34] *See also Order* at n.83 (JA) ("a consolidated franchising authority in Oregon negotiated and approved competitive franchises within 90 days").

Moreover, the "list of legitimate issues to be negotiated is short" when an applicant already has access to rights-of-way, and the Commission "narrow[ed] those issues considerably" by adopting interpretive rules concerning build-out requirements, franchise fees, and various other subjects. *Order* ¶ 71 (JA). In light of these factors, the Commission reasonably found that "90 days provides LFAs ample time to review and negotiate a franchise agreement with applicants that have access to rights-of-way." *Order* ¶ 70 (JA).

Tampa vaguely asserts (Br. 39-41) that "the burdens imposed" by the FCC's *Order* will prevent LFAs from completing franchise negotiations within the designated time frames. It is unclear what "burdens" Tampa has in mind. Far from "burdening" the franchising process, the *Order* should facilitate negotiations between LFAs and franchise applicants. By addressing such potentially contentious topics as build-out requirements and franchise fees, the *Order* has considerably narrowed the issues that have complicated franchise negotiations in the past. *See Order* ¶¶ 82-124 (JA -).[35]

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[35] For that reason, it is not surprising that several LFAs that the FCC "laud[ed]" in the *Order* for their "prompt" disposition of franchise applications apparently took longer to grant franchises than the new rules would have permitted. ACM Br. 44-45 (quoting *Order* at n.83 (JA)). The examples of prompt action cited by the FCC took place before LFAs had the benefit of the guidance provided by the *Order* on issues that have often been the subject of protracted negotiations. Because the *Order* "narrow[ed] those issues considerably," *Order* ¶ 71 (JA), it was reasonable for the Commission to expect that negotiations henceforth would be completed more quickly.

Petitioners assert that delays caused by franchise applicants could make LFAs' compliance with the 90-day deadline impossible. ACM Br. 38-39; Tampa Br. 33; Fairfax Br. 20-34. But the 90-day and six-month review periods do not begin until an applicant files a complete application that contains all information required by law. This "increase[s] applicants' incentive to begin negotiating in earnest at an earlier stage of the process." *Order* ¶ 75 (JA). Moreover, after negotiations begin, "an LFA may toll the running of the 90-day or six-month time period if it has requested information from the franchise applicant and is waiting for such information." *Ibid.* And if both parties agree that they need more time to negotiate, they can extend the deadline by mutual consent. *Order* ¶ 73 (JA).

Furthermore, LFAs can comply with the time limits regardless of the applicants' behavior. The *Order* does not require a franchise *grant* by the deadline; it merely requires LFAs to "render a *decision*" on a franchise application within 90 days. *Order* ¶ 67 (JA) (emphasis added). If negotiations are not successful because (for instance) an applicant is not acting in good faith, LFAs may simply deny the relevant application before the deadline passes so long as they have reasonable grounds for doing so.

ACM asserts (Br. 39) that the FCC's time limits will not give LFAs sufficient time to hold public hearings on pending applications or to obtain consent from elected officials to grant franchises. But ACM offers no concrete evidence to substantiate these speculative claims. The Commission has made clear that the franchise review process may continue to include "multiple levels of review" and public hearings, "provided that a final decision is made within the time period" prescribed by the new rules. *Order* ¶ 73 (JA). And ACM has not identified any specific local laws or obligations that would make it impossible for LFAs to issue decisions within the time frames established by the *Order*. If any such laws exist, they are preempted. *See Order* ¶¶ 125-130 (JA -).

ACM argues (Br. 41-43) that it is irrational for the FCC to require the negotiation of a new franchise within 90 days when the Act gives LFAs more time to consider requests for franchise transfers, modifications, and renewals. But the agency reasonably explained that policy concerns justified a tighter time frame for processing competitive franchise applications "because the costs associated with delay are much greater with respect to entry." *Order* ¶ 71 (JA). Consumers "are not deprived of service" while an LFA considers a request to transfer, modify, or renew an existing cable franchise. *Ibid.* By contrast, LFA inaction on a competitive franchise application "deprives consumers of the benefits of cable competition." *Ibid.*

(3) The Commission Adopted A Reasonable Remedy For Violations Of Its Time Limit Rules.

Petitioners also challenge the "interim franchise" remedy that the FCC devised for violations of its time limit rules. ACM Br. 30-32, 47; Tampa Br. 41-42; NCTA Br. 34. The Commission adopted this remedy "to encourage franchising authorities" to act within the time limits. *Order* ¶ 77 (JA). It understood that LFAs would have little incentive to abide by the FCC's deadlines unless failure to comply carried "meaningful consequences." *Ibid.* Accordingly, the Commission declared that "if an LFA has not made a final decision" by the applicable deadline, "the LFA will be deemed to have granted the applicant an interim franchise based on the terms proposed in the application." *Ibid.* This interim franchise would "remain in effect only until the LFA takes final action on the application." *Ibid.*[36]

The Commission predicted that a deemed grant of an interim franchise "will be the exception rather than the rule because LFAs will generally comply with the Commission's rules and either accept or reject applications within the applicable

[36] Regulations adopted by other federal agencies take the same approach to inaction by state officials. *See, e.g.,* 40 C.F.R. § 141.716(a)(4) (if a state does not act upon watershed control plans by the regulatory deadline, those plans are "considered approved" until the state subsequently withdraws such approval); 42 C.F.R. § 438.56(e)(2) (if a state agency fails to act on an application to withdraw from a Medicaid managed care plan by the regulatory deadline, the application is "considered approved").

time frame." *Order* ¶ 81 (JA). Moreover, in the rare case when an interim franchise takes effect, the LFA may continue to negotiate with the applicant; and it will be within the LFA's authority to deny the franchise application even after the deadline and thus terminate the interim franchise. *Ibid.*; *id.* ¶ 77 (JA).

Section 617 creates a similar deadline-enforcing remedy. It provides that a franchise transfer request "shall be deemed granted" if the LFA fails to act on the request within 120 days. 47 U.S.C. § 537. ACM contends (Br. 32) that because Congress did not include a similar "deemed grant" requirement in section 621(a)(1), the FCC lacks authority to mandate a deemed grant of a competitive franchise application. Once again, ACM fails to appreciate the "difference between a statutory *requirement* … and a statutory *authorization*." *ADEC*, 540 U.S. at 491.

The FCC's authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. § 201(b), also includes the authority to adopt prophylactic rules to curb abuses of the franchising process.[37] The D.C. Circuit recently reaffirmed the "long-standing principle that the breadth of agency discretion is … at zenith when the action

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[37] *Cf. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378, 1382 (D.C. Cir. 1990) (upholding a "prophylactic" FCC rule designed to curb cost accounting abuses by telephone companies).

assailed relates primarily … to the fashioning of … remedies and sanctions."[38] The Commission here found that without the prospect of an interim franchise to spur action, LFAs that have been engaging in unreasonable delay would have little incentive to alter their behavior. *Order* ¶¶ 76-77 (JA -). Where (as here) the remedy that the agency adopts is "necessary to the effective enforcement of its regulations," courts should defer to the agency's choice of remedy. *ICC v. Transcon Lines,* 513 U.S. 138, 146 (1995).[39]

ACM asserts (Br. 47) that the FCC should not have based its interim franchise on the terms of the applicant's offer because that "offer may not be consistent with local rights of way obligations or assure that local needs and interests are met." But if an LFA objects to an applicant's offer, it can prevent an

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[38] *American Telephone & Telegraph Co. v. FCC,* 454 F.3d 329, 334 (D.C. Cir. 2006) (internal quotations omitted). *See also New England Telephone & Telegraph Co. v. FCC,* 826 F.2d 1101, 1108 (D.C. Cir. 1987) ("the Commission enjoys significant discretion to choose among a range of reasonable remedies"), *cert. denied,* 490 U.S. 1039 (1989).

[39] Contrary to petitioners' suggestion, the interim franchise remedy is not inconsistent with section 621(b)(1)'s direction that a cable operator may not provide cable service without a franchise because an interim franchise constitutes a franchise. Furthermore, no provision of the Act precludes the Commission from adopting a prophylactic rule that would deem an interim franchise to have been issued due to LFA inaction. Under this rule, LFAs retain the ultimate decisionmaking authority; they may prevent cable operators from offering service in their jurisdictions by denying franchise applications before interim franchises take effect.

interim franchise from taking effect by timely *denying* the application.[40] And even if an interim franchise takes effect, it "will remain in effect only until the LFA takes final action on the application." *Order* ¶ 77 (JA). Thus, if LFAs have serious concerns about the terms of an applicant's offer, they can take action to limit an interim franchise's duration or prevent its implementation altogether. In any event, nothing in the *Order* – including the interim franchise rule – constrains an LFA's ability to enforce reasonable construction safety requirements, restrictions on work hours, and other regulations that ensure the safe and efficient management of public rights-of-way.[41]

ACM argues (Br. 47) that the FCC should have based the interim franchise on existing cable franchise ordinances or franchise agreements with incumbent cable operators. The Commission reasonably explained that those options were "impractical." *Order* ¶ 77 (JA). The record showed that "a competitive video provider who enters the market today is in a fundamentally different situation" from an incumbent cable operator. *Order* ¶ 138 (JA) (quoting Verizon Comments at 77 (JA)). Unlike incumbents – which entered the cable market as

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[40] For this reason, Fairfax County's argument (Br. 30) that a new entrant will have little incentive to engage in meaningful negotiations is wide of the mark.

[41] *See Order* ¶ 76 (JA) (the interim franchise remedy was selected "to provide a meaningful incentive for [LFAs] to abide by the [FCC's] deadlines … while at the same time *maintaining LFAs' authority to manage rights-of-way*") (emphasis added).

monopolists and could therefore pay for expensive concessions to LFAs "out of the supra-competitive revenue from their on-going operations" in a "captive market" – new entrants have "no assured market position" nor "anywhere near the number of subscribers over which to spread [their] costs." *Ibid.* (internal quotations omitted). Given these differences, the Commission reasonably concluded that it was often unrealistic to expect new entrants to take on the same obligations that incumbents had accepted in their original franchise agreements. *Order* ¶ 26 (JA).

Although Tampa claims otherwise (Br. 42), there is plainly a "rational connection between the harm the FCC identifies – delay in deployment – and the [interim franchise] remedy." The Commission reasonably found that an interim franchise remedy would significantly reduce delays by providing a powerful incentive for LFAs to act on franchise applications within the time frames prescribed by the *Order*. Petitioners' strenuous objections to the remedy confirm the Commission's assessment. Given their strong desire to prevent interim franchises from taking effect, LFAs will likely make a concerted effort to comply with the FCC's time limit rules. That is precisely what the agency predicts will occur. *Order* ¶ 81 (JA).[42]

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[42] *See Cellnet,* 149 F.3d at 441 ("an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review").

B. The Commission's Restrictions On Unreasonable Build-Out Mandates Are Lawful And Reasonable.

Disputes over the proper pace of build-out rank among "the most contentious" issues in the franchising process. *Order* ¶ 31 (JA). LFAs often attempt to condition the grant of competitive franchises on new entrants' commitment to build out their networks further and faster than their economic judgments would dictate. After reviewing an abundant record, the FCC found that unreasonable build-out requirements can "greatly hinder the deployment of new video and broadband services." *Ibid.*; *see generally id.* ¶¶ 31-42 (JA -). Accordingly, the Commission reasonably concluded that an LFA's refusal to grant a competitive franchise application on the basis of "unreasonable build-out mandates" would violate section 621(a)(1). *Order* ¶ 89 (JA); *see generally id.* ¶¶ 83-86 (JA -).

The FCC also provided guidance on the types of mandates that likely would qualify as "unreasonable." *Order* ¶¶ 87-93 (JA -). "[A]bsent other factors," the Commission stated, it "would seem unreasonable" to require:

- "a new competitive entrant to [be able to] serve everyone in a franchise area before it has begun providing service to anyone";
- "facilities-based entrants, such as incumbent [local phone companies], to build out beyond the footprint of their existing facilities before they have even begun providing cable service";

- "more of a new entrant than an incumbent cable operator" (for instance, by "requiring the new entrant to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator"); or
- "the new entrant to build out and provide service to areas of lower density than those that the incumbent cable operator is required to build out to and serve."

Order ¶ 89 (JA); *see also id.* ¶ 90 (JA) (providing additional guidance). At the same time, the Commission said it would be reasonable "for an LFA to consider benchmarks requiring the new entrant to increase its build-out after a reasonable period of time had passed after initiating service and taking into account its market success." *Order* ¶ 89 (JA).

(1) The FCC's Treatment Of Unreasonable Build-Out Mandates Rests Upon A Reasonable Construction Of Section 621(a)(1).

Petitioners contend that the Commission's build-out ruling violates the Communications Act because an LFA "has the *right* to *require* an applicant to offer cable service to all households in the franchise area," subject "only" to the limitation (in section 621(a)(4)(A)) that the applicant must be allowed "a reasonable period of time to do so." ACM Br. 33; *accord* Tampa Br. 43; NYC Br. 7. As an initial matter, many of the build-out constraints the FCC prescribed are in effect timing restrictions that would fall within section 621(a)(4)(A) even under petitioners' interpretation of it.[43] But petitioners' argument suffers from a more fundamental flaw. As the Commission found, section 621(a)(4)(A) – far from conferring *rights* on LFAs – is structured as a "*limitation* on LFAs' authority." *Order* ¶ 84 (JA) (emphasis added). In circumstances where LFAs may require cable operators to build out their facilities throughout a franchise area, the provision requires an LFA to "allow the applicant's cable system a reasonable period of time" to do so. *Ibid.* (quoting 47 U.S.C. § 541(a)(4)(A)).[44]

Nowhere, however, does section 621(a)(4)(A) (or any other provision of the Act for that matter) give LFAs the right to demand *in all instances* that an applicant be capable of providing service to all households. Indeed, the contrast between sections 621(a)(4)(B) & (C), which *provide* LFAs with authority, and section 621(a)(4)(A), which *limits* LFAs' authority, is striking. In short, section 621(a)(4)(A) does not speak to "the central question here": whether LFAs violate section 621(a)(1) if they refuse to grant a competitive franchise because an

[43] *See, e.g., Order* ¶ 89 (JA) (it would seem unreasonable to require a new entrant "to build out its facilities in a shorter period of time than that originally afforded to the incumbent cable operator").

[44] The statute's legislative history demonstrates that Congress considered and declined to enact statutory language that would have implemented petitioners' preferred reading. *See Order* ¶ 85 (JA) (the legislation, as enacted, removed language from the House bill that would have provided that "an LFA's 'refusal to award a franchise shall not be unreasonable if, for example, such refusal is on the ground … of inadequate assurance that the cable operator will, within a reasonable period of time, provide universal service throughout the entire franchise area'") (quoting H.R. Rep. No. 102-628, at 9 (1992)).

applicant will not agree to unreasonable build-out requirements. *Order* ¶ 84 (JA). "To answer that question," the Commission properly examined section 621(a)(1) and the Communications Act's broader goals. *Ibid.*

ACM also contends (Br. 34, 57) that the Commission's reading of section 621(a)(1) violates the requirement of section 621(a)(3) that LFAs "shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides." *See* 47 U.S.C. § 541(a)(3). But section 621(a)(3) only "prohibits discrimination on the basis of income; it manifestly does not require universal service." *ACLU*, 823 F.2d at 1580. Thus, restrictions on the scope of LFAs' power to mandate cable system build-outs pose no necessary conflict with section 621(a)(3). Moreover, the Commission expressly disclaimed any intent "to limit LFAs' authority to appropriately enforce Section 621(a)(3) and to ensure that their constituents are protected against discrimination." *Order* ¶ 92 (JA). Petitioners do not explain how any of the guidance the Commission provided regarding potentially unreasonable build-out mandates contradicts this express statement.

Finally, petitioners contend that the Commission's build-out ruling fails to consider other statutory provisions, such as 47 U.S.C. §§ 521(2), 544(b), and 552(a)(2). ACM Br. 34; Tampa Br. 43; NYC Br. 8-9. This claim is not properly before the Court because no party presented it to the Commission. *Cellnet*, 149

F.3d at 442 (the Communications Act bars litigants from presenting claims that rely "on questions of fact or law upon which the Commission … has been afforded no opportunity to pass") (quoting 47 U.S.C. § 405(a)).

In any event, the claim is meritless. The FCC determined generally with respect to 47 U.S.C. § 521(2) that LFA mandates (such as unreasonable build-out requirements) that have the effect of "prevent[ing] competition" do not "'assure that cable systems are responsive to the needs and interests of the local community.'" *Order* ¶ 49 (JA) (quoting 47 U.S.C. § 521(2)). Moreover, the other two provisions – relating to "facilities and equipment" requirements and "construction schedules and other construction-related performance requirements"[45] – are irrelevant. While these provisions may grant LFAs some authority related to the deployment of cable facilities, neither grants LFAs *carte blanche* to impose build-out requirements that result in "unreasonabl[e] refus[als] to award" competitive franchises under section 621(a)(1). That is all that the *Order* on review constrains.

[45] *See* 47 U.S.C. §§ 544(b), 552(a)(2).

(2) The FCC's Treatment Of Unreasonable Build-Out Requirements By LFAs Was The Product Of Reasoned Decisionmaking.

Petitioners' APA challenges to the Commission's build-out ruling fare no better than their statutory claims. Tampa claims (Br. 44-45) that the FCC had no basis to conclude that build-out demands made by LFAs were a problem. But the record is replete with comments from numerous current and prospective cable competitors detailing how build-out demands had delayed competitive entry or prevented it altogether.[46] In addition, the record included both economic studies regarding the competitive effects of build-out requirements from academic/non-profit sources and the expert views of the Justice Department's Antitrust Division ("DOJ").[47] For instance, DOJ argued that

> [b]uild-out requirements that impose on an entrant the obligation to serve a geographic area that the entrant had concluded would be uneconomical to reach can lead to the entrant abandoning its plans for the entire area or, if the entrant agrees to the condition, result in competition being less vibrant or efficient.

DOJ May 10 *Ex Parte* at 12-13 (JA -). Accordingly, the Department urged the Commission to prohibit LFAs from imposing "*any* build-out requirements, except

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[46] *See Order* ¶¶ 31-34 & nn.103-117 (JA -) (cataloguing comments); *see also* AT&T Comments at 44-60 (JA -); Qwest Comments at 8-13 (JA -); Verizon Comments at 39-42, O'Connell Declaration ¶¶ 23-27 (JA - , -); USTA Comments at 22-25 (JA -).

[47] *See Order* ¶ 36 & nn.122, 123 (JA) (compiling comments).

to prevent the income discrimination the statute prohibits." *Id.* at 16 (JA)
(emphasis added).

Similarly, the non-profit Phoenix Center for Advanced Legal & Economic Public Policy Studies introduced research suggesting that "while … build-out requirements may have altruistic intentions behind them … *ex ante* build-out requirements are, on average, counterproductive and serve to *slow down* deployment of communications networks."[48] The Center argued that such requirements are "a self-defeating exercise" that "reduce[s] consumer welfare and increase[s] the profits of incumbent providers in many communities."[49] Other economic policy analysts,[50] manufacturers of telecommunications equipment,[51] and at least one consumer group[52] presented similar assessments.

Tampa disputes (Br. 45-46) whether it would be unreasonable for an LFA to require new entrants to match or exceed the build-out obligations that originally

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[48] Phoenix Center Policy Paper No. 22: "The Consumer Welfare Cost of Cable 'Build-out' Rules" at 3 (2005) (JA).

[49] *Ibid.*

[50] Mercatus Center (George Mason University) Comments at 39-42 (JA -); Comments of American Consumer Institute at 7 (JA).

[51] Comments of Ad Hoc Telecom Manufacturer Coalition at 5-6 (JA -).

[52] Comments of Consumers for Cable Choice at 8 (JA).

were imposed upon incumbents.[53] But the Commission reasonably explained that today's new cable service entrants face significantly greater risks than incumbents faced when they originally negotiated their franchises. *Order* ¶ 87 (JA). Incumbent cable operators – unlike today's prospective competitors – often entered into their initial franchise agreements in exchange for a government-sanctioned monopoly over the provision of cable service. *Order* ¶¶ 48, 87, 138 (JA , ,). Such monopoly conditions would permit incumbents to use supra-competitive rates to finance extensive build-out obligations that would not be practical for new entrants in a competitive environment. *Order* ¶¶ 87-88 (JA -).

Moreover, even without government-sanctioned monopolies, incumbents benefited from the significant "first-mover" advantage of building out at a time when they faced no actual competition. By contrast, new entrants generally must wrest their customers away from entrenched incumbents. *Order* ¶¶ 35, 88, 138 (JA , ,). To do this, newcomers often "must begin offering service within a smaller

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[53] Intervenor New York City expands upon this argument with a number of observations that are untethered to the record, to petitioners' briefs, or to other sources of authority. *See* NYC Br. 12-18. Those observations – which are legally meritless in any event – are not properly before the Court to the extent that they reach beyond petitioners' claims. *See Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues"); *accord Texas Coalition of Cities for Utility Issues v. FCC*, 324 F.3d 802, 805 n.1 (5th Cir. 2003); *Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990); *cf. Cellnet*, 149 F.3d at 443 (amici may not expand issues before the Court).

area to determine whether [they] can reasonably ensure a return on [their] investment before expanding." *Order* ¶ 35 (JA).[54] The Commission reasonably concluded, therefore, that LFA requirements that new entrants proceed more quickly or broadly "can have the effect of granting *de facto* exclusive franchises" to the incumbent notwithstanding section 621(a)(1)'s prohibition against exclusive franchises. *Order* ¶ 40 (JA); *see also id.* ¶ 37 (JA) ("In many cases, build-out requirements may have precisely the opposite effect – they deter competition and deny consumers a choice.").

Petitioners argue, finally, that the Commission's guidance regarding build-out mandates is arbitrarily vague in light of qualifying language in paragraph 89 of the *Order* stating, for example, that the guidance applies "absent other factors." ACM Br. 55; Tampa Br. 46; NYC Br. 11-12. Such challenges to the *Order* were never presented to the agency and thus are not properly before the Court. 47 U.S.C. § 405(a); *Cellnet*, 149 F.3d at 442-43. In any event, the Commission's guidance, even with the qualifications, is significantly more concrete than the

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[54] Tampa suggests (Br. 45) that telephone companies – like cable incumbents – have large existing customer bases over which to spread build-out costs. But, as new entrants in the cable marketplace, such telephone companies would not have large existing customer bases *for video services*. If petitioners are suggesting that telephone companies could load the costs of *cable*-related network upgrades onto their common carrier *telephone service* customers, such cost-shifting would be constrained by state and federal regulation as well as competitive conditions in the market for voice telephony.

statutory phrase it helps construe – "*unreasonably* refuse to award an additional competitive franchise" (47 U.S.C. § 541(a)(1) (emphasis added)). At the same time, the qualifying language petitioners challenge leaves LFAs free to argue that the Commission's general guidance should not apply in particular circumstances – a fact that effectively rebuts petitioners' inconsistent claim (ACM Br. 57; NYC Br. 12) that the Commission's treatment of build-out mandates is too rigid to account for varied and pertinent local circumstances.[55]

C. The Commission's Rules Construing The Act's Franchise Fee Provision Are Reasonable.

Under section 622 of the Act, an LFA may not impose a "franchise fee" on a cable operator that exceeds 5 percent of its revenues from "the operation of the cable system to provide cable services." 47 U.S.C. § 542(b). It would obviously be unreasonable if an LFA refused to award a competitive franchise because an applicant refused to pay fees that were unlawful under section 622, and petitioners do not seriously contend otherwise. Moreover, uncertainty about the franchise fee limitation "can lead to delay in the franchising process as well as unreasonable refusals to award competitive franchises," *Order* ¶ 94 (JA), so the Commission

[55] *Cf. National Rural Telecom Association v. FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993) ("So long as the underlying rules are rational … waiver is an appropriate method of curtailing the inevitable excesses of the agency's general rule.").

clarified LFAs' franchise fee authority in four respects. Each of the Commission's determinations was reasonable and should be upheld.

1. Franchise fee revenue base. The Commission "clarif[ied] that a cable operator is not required to pay franchise fees on revenues from non-cable services" because section 622 limits the franchise fee revenue base to revenues derived from the provision of cable services. *Order* ¶ 98 (JA). New York City disputes this ruling (Br. 19) *only if* it is "construed" to exempt cable operators from fees imposed by virtue of their provision of *non*-cable services (such as telecommunications services). For example, New York City is concerned (Br. 20) that the *Order* may preclude LFAs from obtaining compensation from telephone companies for the use of local rights-of-way under 47 U.S.C. § 253(c) if those companies also provide cable service.

The Court lacks jurisdiction over New York City's claim because: (1) this argument was not first presented to the Commission, 47 U.S.C. § 405(a); (2) as an intervenor, New York City may not present arguments that no petitioner has raised, *see* note 53 above; and (3) New York City's claim is not ripe, because the *Order* addresses only whether "non-cable services are … subject to '*cable services*' fees" under section 622(b) (*Order* ¶ 98 (JA) (emphasis added)), and does not speak to the lawfulness of fees other than cable franchise fees.[56]

2. Charges incidental to the awarding of a franchise. Section 622(g)(2)(D) excludes from the definition of "franchise fee" – and hence from the 5 percent cap on such fees – "requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages." 47 U.S.C. § 542(g)(2)(D). The Commission determined that this exclusion was "limited to the list of incidentals in the statutory provision, as well as other minor expenses." *Order* ¶ 103 (JA). Citing three district court decisions that it found "instructive," the Commission clarified that the list of "non-incidental" charges

[56] This is not the only hypothetical issue that the parties seek to raise. *See, e.g.*, ACM Br. 53-54 (if a particular statement in the *Order* "is an effort to further broaden the definition of franchise fees, it should also be set aside"); Fairfax Br. 35-38 (because the *Order* "never expressly states that existing franchises are saved from preemption," "it risks opening up existing competitive franchises to attack without justification"); *id.* at 44-50 (complaining that the FCC's rules create uncertainty in some contexts); *id.* at 56 ("To the extent that the FCC apparently meant to exclude equipment from the term 'capital costs,' the *Order* directly contradicts the language of the statute."). These hypothetical claims are not properly before the Court because they were never presented to the Commission. *See* 47 U.S.C. § 405(a). To the extent petitioners claim not to understand the *Order*, they should have sought clarification from the Commission, not this Court. Moreover, contingent claims of this sort are unripe. "The [ripeness] doctrine dictates that courts should decide only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1089 (6th Cir. 1989).

(*i.e.*, charges that would count toward the 5 percent franchise fee cap) includes attorneys' or consultants' fees, as well as "application or processing fees that exceed the reasonable cost of processing the application, acceptance fees, free or discounted services provided to an LFA, any requirement to lease or purchase equipment from an LFA at prices higher than market value, and in-kind payments." *Order* ¶ 104 (JA).

San Francisco contends (Br. 4) that LFAs may charge competitive applicants any amount they wish – "regardless of the reason for or the amount of the fee" – because fees charged "in connection with an application for a new franchise" are not imposed on cable operators as such and therefore are not even "franchise fees" under section 622(g). This argument was not raised before the Commission and, therefore, San Francisco may not raise it here. *See* 47 U.S.C. § 405(a). Furthermore, as an intervenor, San Francisco may not present this argument because no petitioner raised it. *See* note 53 above. In any event, San Francisco's reading of section 622 conflicts with the rules of statutory construction. As the Supreme Court has explained, Congress does not include superfluous exceptions to statutory rules. *See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 13 (2004) ("Exemptions [in ERISA for working owners] would be unnecessary if working owners could not qualify as participants in ERISA-protected plans in the first place."). Here, there would have been no need for

Congress to exempt charges that are "incidental to the *awarding* … of a franchise" if the definition of "franchise fee" did not reach fees imposed on applicants for new franchises. 47 U.S.C. § 542(g)(2)(D) (emphasis added).

Fairfax County argues that any charge that an LFA elects to impose on new applicants during the franchising process is "incidental to" the awarding of new franchises and therefore exempt from the 5 percent cap. Fairfax Br. 53-55; *see also* San Francisco Br. 6. The Commission reasonably rejected that construction of the statute.[57]

As the legislative history makes clear, the purpose of the "incidental to" exception is to allow LFAs to impose "incidental requirements or costs *necessary*" to award or enforce a franchise without regard to the 5 percent limitation. H.R. Rep. No. 98-934, at 64 (1984) (emphasis added).[58] The Commission accordingly determined that extraneous requirements or charges – such as "acceptance fees" or demands for "free or discounted service" – are not "incidental to" the award of a franchise simply because the LFA elects to incur or impose such costs during the

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[57] Contrary to Fairfax County's argument (Br. 54), the Commission's reasonable interpretation of section 622 is entitled to *Chevron* deference where "the context and cross-referenced opinions … make the FCC's rationale obvious." *Global Crossing*, 127 S. Ct. at 1525 (citation omitted).

[58] *See also* Webster's Third New International Dictionary of the English Language Unabridged 1142 (2002) (defining "incidental" to mean, among other things, "subordinate, nonessential, or attendant in position or significance").

franchising process. *See Robin Cable Systems v. City of Sierra Vista*, 842 F. Supp. 380, 381 (D. Ariz. 1993) (exceptions to franchise fee cap are "narrowly tailored").

Although Fairfax County challenges the Commission's decision, it makes no attempt to show how, for example, requiring new applicants to provide "free or discounted service" or to lease equipment from the LFA at above-market rates is necessary to the franchising process – aside from providing a convenient end-run around the 5 percent franchise fee cap. *See Order* ¶ 104 (JA). Moreover, the Commission's determination that application and processing fees exceeding the reasonable cost of processing an application are not "incidental to" the award of a franchise was plainly reasonable. Such fees are not "necessary" for awarding a franchise.

Fairfax County (Br. 51) also takes issue with the Commission's decision to include attorney and consultant fees as non-incidental charges that count toward the franchise fee cap. But as the Commission observed, district courts have consistently rejected arguments that attorney and consultant fees are recoverable in excess of the franchise fee limitation, and Fairfax County has not shown that such fees are "necessary" to the awarding of competitive franchises. *Order* ¶ 103 (JA); H.R. Rep. No. 98-934, at 64. The Commission's decision therefore should be affirmed.

3. In-kind payments unrelated to the provision of cable service. Section 622(g)(1) defines "franchise fee" to include "*any* tax, fee, or assessment *of any kind*." 47 U.S.C. § 542(g)(1) (emphasis added). The Commission reasonably concluded that this broad definition includes "in kind" requirements that are unrelated to the provision of cable service. *Order* ¶ 108 (JA).

Petitioners contend that the term "franchise fee" includes only monetary payments (ACM Br. 52 & n.149; Tampa Br. 48 & n.38), but the Commission reasonably rejected that interpretation. To be sure, portions of the legislative history discuss franchise fees in terms of cash contributions for non-cable-related projects. *See* H.R. Rep. No. 98-934, at 65. The statutory text, however, is not so limited, and petitioners offer no rational reason why Congress would have subjected monetary contributions for non-cable-related projects to a 5 percent cap, while placing no restriction on LFAs' ability to achieve the same result through in-kind contributions. Under petitioners' reading, a requirement that a franchisee pay an LFA for the construction of a library would fall within the franchise fee cap, but a requirement that the franchisee itself build a library would not be covered. *Cf. Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J., concurring) ("for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense"). Indeed, section 622(g)(2)(D), which excludes from the definition of franchise fees "*requirements or charges* incidental to the awarding or enforcing" of a franchise, makes sense only if the term "franchise fee" encompasses "requirements" and not just cash payments. Furthermore, section 622(g)(2)(C), which excludes from the definition of franchise fees "capital costs which are required by the franchise to be *incurred by the cable operator* for [PEG] access facilities," also indicates that the definition of franchise fees extends beyond monetary payments made by an operator to an LFA.[59]

4. Contributions in support of PEG services and equipment. Section 622(g)(2)(C) exempts from the definition of a "franchise fee" the "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental [PEG] access facilities." 47 U.S.C. § 542(g)(2)(C). The Commission concluded that "[c]apital costs refer to those costs incurred in or associated with the construction of PEG access facilities," as opposed to "payments in support of the use of PEG access facilities." *Order* ¶ 109 (JA). This is consistent with the legislative history, which makes clear that Congress intended the franchise fee exclusion in section 622(g)(2)(C) to extend only to

[59] ACM (Br. 52) and Tampa (Br. 48) incorrectly argue that the Commission's conclusion regarding in-kind contributions is inconsistent with a letter ruling issued by the FCC's staff in *City of Bowie, Maryland*, 14 FCC Rcd 7674 (1999), *amended*, 14 FCC Rcd 9597 (1999). In *City of Bowie*, the staff concluded that a "PEG access fee" was not a "franchise fee" subject to the 5 percent cap. 14 FCC Rcd at 9597-98. Nothing in that letter ruling addressed the issue of in-kind contribution requirements.

"capital costs *associated with the construction* of [PEG] access facilities." H.R. Rep. No. 98-934, at 26 (emphasis added).

Contrary to petitioners' suggestions (Tampa Br. 48-49; ACM Br. 53; Fairfax Br. 58), the Commission did not decide that the term "capital costs" necessarily excluded the costs of purchasing equipment used to provide PEG access. The Commission distinguished between capital costs, which are not counted toward the 5 percent franchise fee cap, and "payments in support of the use of PEG access facilities," such as "salaries and training," which are. *See Order* ¶ 109 (JA). The Commission explained that "[c]apital costs refer to those costs *incurred in or associated with* the construction of PEG access facilities." *Ibid.* (JA -) (emphasis added). The cost of purchasing equipment could be a "capital cost" if it falls within that description.[60]

[60] Petitioners also incorrectly assert that the *Order* counts so-called "voluntary" contributions made by cable operators toward the 5 percent franchise fee cap. ACM Br. 54 n.154; Tampa Br. 49; *see also* San Francisco Br. 9. The *Order* addresses only "the proper treatment of *LFA-mandated* contributions in support of PEG services and equipment." *Order* ¶ 109 (JA) (emphasis added). Truly "voluntary" contributions would not be "LFA-mandated." Of course, if an applicant were required to offer or agree to "voluntary" contributions in order to be awarded a franchise, such contributions would not be truly voluntary.

D. The Commission Placed Reasonable Limits On The PEG And I-Net Obligations That LFAs Could Impose On Competitive Franchise Applicants.

The Commission properly determined that it would be unreasonable for an LFA to refuse to award a competitive franchise based upon a new entrant's refusal to undertake specified unreasonable obligations relating to public, educational, and governmental (PEG) channels and institutional networks.[61] Section 611(a) of the Communications Act provides that LFAs may "establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section." 47 U.S.C. § 531(a). Section 621, in turn, specifies that, "[i]n awarding a franchise," an LFA may require "adequate assurance" that the franchisee will provide "adequate" PEG facilities or financial support. 47 U.S.C. § 541(a)(4)(B).

The Commission determined that the term "adequate" should be given its plain meaning of "satisfactory or sufficient," and that LFAs that imposed PEG and I-Net commitments on new entrants in excess of what is "adequate" would violate section 621(a)'s prohibition on "unreasonabl[e] refus[als]" to award competitive franchises. *Order* ¶ 112 (JA).

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[61] Institutional networks (or I-Nets) are networks that are generally available to non-residential subscribers. LFAs may require cable operators to set aside channel capacity on I-Nets for educational or governmental use. 47 U.S.C. §§ 531(b), (f).

The Commission largely left to LFAs the determination of what PEG and I-Net commitments were "adequate." *See Order* ¶ 113 (JA). The Commission, however, established benchmarks for determining whether specific PEG and I-Net requirements are unreasonable. *Order* ¶ 112 (JA). Under these benchmarks, an LFA may not impose "more burdensome PEG carriage obligations [on a competitive applicant] than it has imposed upon the incumbent cable operator," *Order* ¶ 114 (JA), or require new entrants to "provide PEG support that is in excess of the incumbent cable operator's obligations," *id.* ¶ 120 (JA). In addition, LFAs may not impose "completely duplicative" requirements on new entrants, although they may require new entrants to "provide additional capability or functionality" or "redundancy needed for, for example, public safety." *Order* ¶ 119 (JA). In addition, it would be unreasonable for an LFA to refuse to award a competitive franchise because a competitive applicant declined to "pay the face value of an I-Net that will not be constructed." *Ibid.* LFAs and new entrants can agree, however, for the new entrant "to share *pro rata* costs with the incumbent cable operator." *Order* ¶ 120 (JA). Such a cost sharing arrangement, the Commission concluded, would be *per se* reasonable. *Ibid.*

Tampa contends (Br. 52) that the term "adequate" in section 621(a)(4)(B) does not lend itself to the adoption of *per se* rules as to the types of PEG requirements that can constitute an "unreasonable" refusal under section 621(a)(1).

Congress, however, often uses terms like "adequate" and "unreasonable" in statutes, with the expectation that administrative agencies will adopt rules to "fill in the gaps." *See, e.g.*, *Global Crossing*, 127 S. Ct. at 1522; *Haggar Apparel*, 526 U.S. at 391-92. Moreover, petitioners offer no serious argument, for example, why it would be reasonable for an LFA to require new entrants to pay for an I-Net that will not be constructed. Here, the Commission rejected calls for "standard terms for PEG channels" and stated that "LFAs are free to establish their own requirements for PEG," *Order* ¶ 113 (JA), subject to the limited constraints the Commission imposed to prevent violations of section 621(a)(1). That was an appropriate exercise of the agency's authority.

Contrary to ACM's contention (Br. 49), the Commission's PEG rules do not prevent LFAs from responding to changes in local community needs. The Commission merely prohibited LFAs from requiring new entrants to provide "more burdensome" and "completely duplicative" PEG and I-Net services. It did not preclude LFAs from requiring *different* PEG and I-Net services. Moreover, nothing in the *Order* precludes LFAs from harmonizing and updating the PEG and I-Net obligations of competitors and incumbents during franchise renewal proceedings. Rather the Commission reasonably determined that it would be unreasonable for an LFA to demand greater PEG obligations from a new entrant with no subscriber base than from an established incumbent.

Finally, contrary to Tampa's suggestion (Br. 52), the Commission did not adopt a rule requiring LFAs to accept cost-sharing mechanisms between incumbents and new entrants. LFAs are not required to impose a cost-sharing approach on new entrants, but if they do, the Commission simply confirmed that such a requirement would not violate section 621(a)(1).[62]

E. The Commission Imposed Reasonable Limits On The Regulation Of Mixed-Use Networks.

Because LFAs' jurisdiction under Title VI "applies only to the provision of cable services over cable systems," the Commission concluded that an LFA may not reasonably refuse to award a competitive cable franchise "based on issues related to [non-cable] services or facilities." *Order* ¶ 121 (JA). The agency further clarified that "an LFA may not use its video franchising authority to attempt to regulate a [phone company's] entire network beyond the provision of cable services." *Order* ¶ 122 (JA). These rulings are consistent with the statutory definition of "cable system," which expressly states that a mixed-use

[62] Tampa asserts (Br. 53) that the cost-sharing framework outlined in the *Order* does not allow for recovery of "additional PEG capital costs caused by the new entrant." The Commission, however, was clear that LFAs may require new entrants to bear such costs. *See Order* at n.396 (JA). Tampa also incorrectly suggests (Br. 54) that the Commission was required to justify "its departure from the OVS [open video system] formula" for cost sharing. The Commission's OVS rules are based on a specific statutory provision, 47 U.S.C. § 573(c)(2)(A), that does not apply in this context. *See Order* at n.396 (JA) (describing OVS rules as "another context").

network qualifies as a cable system only "to the extent such facility is used in the transmission of video programming directly to subscribers." 47 U.S.C. § 522(7); *see also* 47 U.S.C. § 541(b)(3) (further clarifying that an LFA cannot use its cable franchising authority to regulate telecommunications services).

Although Tampa contends (Br. 50-51, 54-55) that the Act does not limit local authority to regulate mixed-use networks, it acknowledges (Br. 55 n.48) that the statutory definition of "cable system" expressly restricts LFA authority under Title VI to regulation of cable services.

Tampa also argues (Br. 54) that the FCC has improperly preempted local consumer protection laws governing non-cable services. This claim has been waived because no party presented it to the Commission. *See* 47 U.S.C. § 405(a); *Cellnet*, 149 F. 3d at 442-43. In any event, Tampa overstates the scope of the preemption set forth in the *Order*. Under the *Order*, an LFA may not condition a cable franchise on compliance with laws covering non-cable services; nor may an LFA invoke its video franchising authority to impose regulations on non-cable services. *Order* ¶¶ 121-122 (JA). This preemption flows logically from the way in which the Act defines "cable system." The *Order*, however, does *not* preempt laws that independently authorize local customer service regulation of non-cable services, so long as those laws do not interfere with the cable franchising process.

IV. PETITIONERS' REMAINING CLAIMS ARE INSUBSTANTIAL.

A. The Commission's Rules Are Constitutional.

Petitioners raise an assortment of constitutional challenges to the *Order*. None can withstand scrutiny.

1. Tenth Amendment. Petitioners argue that the *Order* violates the Tenth Amendment. Tampa Br. 20-22; New Jersey Br. 17, 20-21. They are wrong.

"[I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *Watters v. Wachovia Bank,* 127 S. Ct. 1559, 1573 (2007) (quoting *New York v. United States,* 505 U.S. 144, 156 (1992)). The Commerce Clause "is a grant of plenary authority to Congress" to regulate interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 276 (1981). It empowers the federal government to regulate the construction and operation of the nation's cable television infrastructure. *Order* ¶ 136 (JA).[63] Where (as here) a federal regulatory scheme "is supported by affirmative constitutional grants of power to Congress, it is not inconsistent with the Tenth Amendment." *New York,* 505 U.S. at 173; *see also Watters,* 127 S. Ct. at 1573 (rejecting a Tenth Amendment challenge to federal regulation of national bank operations).

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[63] There is no serious dispute that the Commerce Clause authorizes federal regulation of cable television. *See City of New York,* 486 U.S. at 63-66; *Capital Cities Cable,* 467 U.S. at 698-700; *Southwestern Cable,* 392 U.S. at 177-78.

New Jersey asserts (Br. 19) that the FCC's rules improperly limit "state sovereignty." But those rules merely implement a restriction that Congress itself imposed on LFAs. Under the Act, an LFA "may not unreasonably refuse to award an additional competitive franchise." 47 U.S.C. § 541(a)(1). LFAs would be bound to comply with this statutory constraint even if the Commission had never issued the *Order*. Thus, the issue in this case is not whether LFAs "will be allowed to do their own thing, but … whether it will be the FCC or the federal courts that draw the lines to which they must hew" – an issue that does not seriously implicate "States' rights." *AT&T,* 525 U.S. at 378 n.6.

Tampa argues (Br. 21) that the interim franchise remedy "hijack[s]" local authority and thereby violates the Tenth Amendment. The Fourth Circuit rejected a virtually identical argument in *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004). There, the Maryland Public Service Commission had challenged the constitutionality of section 252 of the Act, which authorizes the FCC to assume responsibility for the arbitration and approval of interconnection agreements if a state commission fails to act. *See* 47 U.S.C. § 252(e)(5). Maryland argued that the choice that section 252 gives to the states – "either undertake [certain] responsibilities or relinquish the authority to regulate to the FCC" – "amounts to unconstitutional coercion" under the Tenth Amendment. *Verizon Maryland,* 377 F.3d at 368. The Fourth Circuit disagreed. It found that

"Congress has simply required states to choose between regulating pursuant to federal standards or allowing the FCC to take over." *Ibid.* As the Fourth Circuit recognized, "giving states the option to participate in the federally prescribed regulatory scheme … is permissible under the Tenth Amendment." *Ibid.* (citing *Hodel,* 452 U.S. at 289). That is effectively what the FCC's interim franchise rule does.

The interim franchise rule is clearly distinguishable from the statutes that the Supreme Court struck down in *Printz v. United States,* 521 U.S. 898 (1997), and *New York,* 505 U.S. at 174-77. *Printz* concerned a federal law that conscripted state and local law enforcement officers to conduct background checks on prospective handgun purchasers, without giving states the option to turn the program over to federal regulators. *Printz,* 521 U.S. at 902-04, 933-35. The statute that the Supreme Court invalidated in *New York* required states to choose between regulating according to Congress's instructions or "accepting ownership of" – and liability for – radioactive waste generated by private industry. *New York,* 505 U.S. at 175. The Court held that each of those statutes "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (internal quotations omitted); *see also Printz,* 521 U.S. at 935. The FCC's interim franchise rule, however, does not compel LFAs to enact or enforce anything. Rather, LFAs have a choice: They can act on competitive franchise applications in a timely manner, or they can allow federal rules to fill the regulatory void (at least temporarily) with an interim franchise. Consequently, the FCC's rules do not violate the Tenth Amendment. *See Hodel,* 452 U.S. at 288.

2. Fifth Amendment. According to Tampa (Br. 22), the Commission's "rules for temporary franchises … raise significant Fifth Amendment issues" because they do not guarantee that the terms of an interim franchise "will provide reasonable compensation to the LFA for use of property." This argument suffers from several flaws.

To begin with, numerous courts have held that "the ownership interest municipalities hold in their streets is 'governmental,' and not 'proprietary.'" *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas,* 417 F.3d 216, 222 (1st Cir. 2005) (citing cases from Colorado, Illinois, and New York). Consequently, "it is a mistake to suppose" that a city "is constitutionally and necessarily entitled to compensation" for use of its rights-of-way. *Ibid.* (internal quotations omitted).

Moreover, if a telephone company with pre-existing access to rights-of-way were to obtain an interim cable franchise, it is doubtful that a taking would occur. When state law has already authorized the use of city streets for telephone lines, "it is difficult to see how the transmission of additional video signals along those same lines results in any physical occupation of public rights-of-way beyond that already permitted by the states." *Order* ¶ 134 (JA). Indeed, the Fourth Circuit has held that the deployment of a separate wire to transmit cable television signals "would not impose an additional burden on [a] servient estate" on which telephone poles, power lines, and telephone wires had previously been installed. *C/R TV, Inc. v. Shannondale, Inc.*, 27 F.3d 104, 109 (4th Cir. 1994).

Even assuming that an interim franchise results in a "taking," it would not violate the Fifth Amendment because the Act provides for "just compensation."[64] "Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways." *Order* ¶ 135 (JA). LFAs may assess cable franchise fees up to five percent of a cable operator's gross annual revenue. 47 U.S.C. § 542(b) . The Act's franchise fee provision applies to all cable franchises,

[64] *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) ("so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional").

including interim franchises. Thus, interim franchises raise no Fifth Amendment concerns.[65]

3. First Amendment. Tampa asserts (Br. 23) that the *Order* implicates the First Amendment because "the FCC's preemption of local procedures ... denies the public the opportunity to participate in the franchising process." Tampa appears to contend that the public's First Amendment rights could be infringed because the deadlines imposed by the *Order* may not allow sufficient time for public hearings on pending franchise applications. Tampa cannot raise that issue here because no party presented that claim to the Commission. *See* 47 U.S.C. § 405(a); *Adelphia Communications Corp. v. FCC,* 88 F.3d 1250, 1255-56 (D.C. Cir. 1996) (the exhaustion requirement of section 405 applies to constitutional claims).

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[65] Insofar as Tampa asserts (Br. 22) that the terms of some interim franchises may not provide for adequate compensation, Tampa's takings claim is unripe. The Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (internal quotations omitted). Because Congress in the Tucker Act, 28 U.S.C. § 1491, authorized the Court of Federal Claims to provide relief for takings claims against the federal government, any such claims in any other court "are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County*, 473 U.S. at 195. *See also Preseault v. ICC*, 494 U.S. 1, 11-17 (1990). In any event, it is fully within the LFA's power to prevent the deemed grant of an interim franchise by timely denying a competitive franchise application.

In any event, Tampa's First Amendment claim is baseless. Even assuming that the First Amendment requires public hearings on cable franchise applications, the FCC's rules would not abridge that right. As the Commission has made clear, LFAs remain free to hold public hearings on franchise applications, so long as they act within the time frames established by the *Order*. *See Order* ¶ 73 (JA).

4. Eleventh Amendment. New Jersey attempts to mount an Eleventh Amendment challenge. Br. 18-20. Because no party presented this issue to the Commission, New Jersey is barred from raising it here. *See* 47 U.S.C. § 405(a); *Adelphia,* 88 F.3d at 1255-56.

In any event, the Eleventh Amendment is irrelevant to this case because it "does not extend its immunity to units of local government." *Ability Center of Greater Toledo v. City of Sandusky,* 385 F.3d 901, 902 n.2 (6th Cir. 2004) (quoting *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 369 (2001)). Because LFAs cannot claim immunity under the Eleventh Amendment, New Jersey's challenge fails.

B. The Commission Satisfied APA Notice Requirements.

Petitioners claim that the FCC failed to provide adequate notice of its rules concerning franchise fees, PEG/I-Net obligations, and mixed use regulation. ACM Br. 58-59; NYC Br. 18-19. This claim is insubstantial.

The APA requires notice of "either the terms or substance of the proposed rule *or a description of the subjects and issues involved*." 5 U.S.C. § 553(b)(3) (emphasis added). The notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." *Nuvio Corp. v. FCC,* 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted).

The *NPRM* in this proceeding satisfied that standard. Among other things, it sought comment on whether LFAs' demands were "consistent with the requirements of Title VI," *NPRM* ¶ 13 (JA), as well as "what … specific rules … [the FCC] should adopt to ensure that the local cable franchising process does not unreasonably impede competitive cable entry." *NPRM* ¶ 21 (JA). In response to the *NPRM,* several parties commented that LFA practices concerning franchise fee assessments, PEG/I-Net obligations, and mixed use regulation were erecting unreasonable barriers to entry.[66] On the basis of those comments, the FCC adopted rules to address those issues. Those rules were a "logical outgrowth" of the *NPRM*. *See Covad,* 450 F.3d at 548-49. The "regulation[s] as adopted did not embrace any major subjects that were not described in the notice." *Chrysler Corp. v. Department of Transportation,* 515 F.2d 1053, 1061 (6th Cir. 1975).

[66] *See Order* at nn.316, 334-40, 385-88, 397-400 (JA , - , - , -).

C. The Commission Reasonably Decided To Proceed Incrementally.

Petitioners contend that it was arbitrary for the FCC to preempt local franchising laws while not preempting similar state laws. ACM Br. 37, 45-46, 58; NCTA Br. 37-41. NCTA also argues (Br. 34-37) that the Commission should have extended its rulings on franchise fees and PEG requirements to incumbent cable operators as well as new entrants. The FCC, however, has broad discretion to proceed incrementally, "addressing itself to the phase of the problem which seems most acute to the [regulatory] mind." *National Association of Broadcasters v. FCC,* 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quoting *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955)). The agency's incremental approach in this case was sensible and permissible.[67]

The Commission reasonably declined to preempt certain state laws (many of which involve state-level franchising decisions). It noted that many state franchising laws had been in effect for only a short time, making it difficult to "draw general conclusions with respect to the operation of the franchising process where there is state involvement." *Order* at n.2 (JA). The Commission also

[67] *See Brand X,* 545 U.S. at 1002 (the FCC "need not immediately apply the policy reasoning" of its decisions "to all types" of entities, but may choose to proceed "incrementally"); *Cincinnati Bell Telephone Co. v. FCC,* 69 F.3d 752, 767 (6th Cir. 1995) ("agencies ordinarily may proceed one step at a time" rather than "deal with every aspect of a problem in one proceeding").

rightly recognized that "in light of differences between the scope of franchises issued at the state level and those issued at the local level, it may be necessary to use different criteria for determining what may be unreasonable" under section 621(a)(1). *Order* ¶ 126 (JA).[68] The record here simply did not allow the agency to make those kinds of judgments. *Order* ¶ 126 (JA).

The Commission displayed similar caution in applying its rulings on franchise fees and PEG requirements only to new entrants. It prudently sought additional comment on whether those rulings should also apply to incumbents. *Order* ¶¶ 139-140 (JA -). This approach made good sense: Because the *NPRM* in this proceeding focused on new entrants, the record generally did not address incumbents.

NCTA's complaint about disparate treatment is premature. The Commission has tentatively concluded that its rulings on franchise fees and PEG requirements "should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs." *Order* ¶

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[68] The Commission found, for example, that because *local* franchising requirements may "differ[] significantly" from jurisdiction to jurisdiction within each state, *Order* ¶ 14 (JA), forced compliance with the disparate requirements of multiple LFAs is a "time-consuming and expensive" process that may have a particularly "chilling effect on competitors." *Order* ¶ 15 (JA). By contrast, state-level laws offer "more uniformity in the franchising process" and thus provide at least the "promise [of] assisting new entrants to more quickly begin offering consumers a competitive choice among cable providers." *Order* ¶ 16 (JA).

140 (JA). "Any inconsistency between the order under review and the Commission's treatment of" incumbent cable operators "can be adequately addressed" when the Commission decides whether the rulings in the *Order* should be extended to incumbents. *See Brand X*, 545 U.S. at 1002.

CONCLUSION

The Court should deny the petitions for review.

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September 17, 2007

IN THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

ALLIANCE FOR COMMUNITY MEDIA, ET AL.,	)	
PETITIONERS	)	
v.	)	
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	NO. 07-3391 (AND COSOLIDATED CASES)
RESPONDENTS	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of this Court's order dated July 26, 2007, I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 19920 words.

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September 17, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Alliance For Community Media, ET AL., Petitioners,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

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RESPONDENTS' JOINT APPENDIX DESIGNATIONS

1. Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection Act of 1992*, MB Docket No. 05-311, FCC 06-180, 22 FCC Rcd 5101 (2007).

2. Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, FCC 05-189, 20 FCC Rcd 18581 (2005).

3. Comments Submitted by the City of Indianapolis, MB Docket No. 05-311 (filed Jan. 4, 2006).

4. Comments of the American Consumer Institute, MB Docket No. 05-311 (filed Feb. 10, 2006).

5. Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy, MB Docket No. 05-311 (filed Feb. 13, 2006).

6. Comments of the Fiber-To-The-Home Council, MB Docket No. 05-311 (filed Feb. 13, 2006).

7. Comments of AT&T Inc., MB Docket No. 05-311 (filed Feb. 13, 2006).

8. Comments of the United States Telecom Association, MB Docket No. 05-311 (filed Feb. 13, 2006).

9. Comments of Verizon on Video Franchising, MB Docket No. 05-311 (filed Feb. 13, 2006) (including Declaration of Marilyn O'Connell).

10. Comments of Bellsouth Corporation and Bellsouth Entertainment, LLC, MB Docket No. 05-311 (filed Feb. 13, 2006).

11. National Telecommunications Cooperative Association Initial Comments, MB Docket No. 05-311 (filed Feb. 13, 2006).

12. Public Interest Comment on Video Franchising, filed by the Regulatory Studies Program (RSP) of the Mercatus Center at George Mason University, MB Docket No. 05-311 (filed Feb. 13, 2006).

13. Comments of Qwest Communications International Inc., MB Docket No. 05-311 (filed Feb. 13, 2006).

14. Comments of the City of Chicago, MB Docket No. 05-311 (filed Feb. 13, 2006).

15. Ex Parte Submission of the Department of Justice, MB Docket No. 05-311 (filed May 10, 2006).

16. Opening Comments of Consumers for Cable Choice, MB Docket No. 05-311 (filed Feb. 13, 2006).

17. Phoenix Center Policy Paper No. 22: "The Consumer Welfare Cost of Cable 'Build-out' Rules" (July 2005), attached to Letter from Lawrence J. Spiwak, President, The Phoenix Center, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed Mar. 13, 2006).

18. Phoenix Center Policy Bulletin No. 13: "'In Delay There Is No Plenty': The Consumer Welfare Cost of Franchise Reform Delay" (Jan. 2006), attached to Letter from Lawrence J. Spiwak, President, The Phoenix Center, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed Mar. 13, 2006).

19. Reply Comments of Verizon on Video Franchising, MB Docket No. 05-311 (filed Mar. 28, 2006).

20. Letter from Jeffrey S. Lanning, Associate General Counsel, US Telecom, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed July 28, 2006).

21. Jerry Brito & Jerry Ellig, "Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives," 5 J. Telecomm. & High Tech. L. 199 (2006), attached to Letter from Jerry Ellig Senior Research Fellow, Mercatus Center, George Mason University, to Marlene H. Dortch, Secretary, FCC (filed Dec. 13, 2006).

22. Comments of the Ad Hoc Telecom Manufacturer Coalition, MB Docket No. 05-311 (filed Feb. 13, 2006)

23. Revised Comments of Verizon on Video Franchising, MB Docket No. 05-311 (filed March 6, 2006) (accompanied by Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC)